No. 406 LIBRARY
SUPREME COURT, U.S.

VOLUME I

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
AUG 27 1957
JOHN T. FEY, Clerk

IN THE

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(ORIGINAL RECORD RECEIVED OCTOBER 5, 1956)

U. S. COURT OF APPEALS
FILED
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John A. Fenlon, Jr.
CLERK

INDEX

	Page
Petition for Enforcement of an Order of the National Labor Relations Board	1
Order to File Petition	3
Answer of Better Monkey Grip Company, Respondent, To Petition for Enforcement	5
Certified List of the National Labor Relations Board	9
Charge Against Employer	15
Order Consolidating Cases and Notice of Hearing	20
Complaint	22
Notice of Hearing	26
Complaint	27
Answer of Better Monkey Grip Company	33
Order	36
Intermediate Report and Recommended Order	38
Erratum	72
Exceptions of Better Monkey Grip Company to the Intermediate Report and Recommended Order of the Trial Examiner and to the Rulings of the Trial Examiner at the Hearing	75
Decision and Order	87
Petition for Reconsideration and, in the Alternative, Motion for Remand	97
Order	140

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL-CIO, Case No. 16-CA-814."

In support of this petition the Board respectfully shows:

(1) Respondent is a Texas corporation engaged in business in the State of Texas, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 30, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 38 (1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board and requiring Respondent, its

officers, agents, successors and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington D. C.
this 24th day of August 1956.

ORDER TO FILE PETITION

In The United States Court of Appeals
For the Fifth Circuit

No. 16278

National Labor Relations Board,
Petitioner,
versus
Better Monkey Grip Company,
Respondent.

A petition for the Enforcement of an Order of the National Labor Relations Board made on April 30, 1956, the proceeding known upon the records of the Board as "BET-

TER MONKEY GRIP COMPANY and UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Case No. 16-CA-814," having been presented to this Court;

IT IS ORDERED that said petition be filed and the case docketed as of August 28, 1956; and

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the proceeding before the National Labor Relations Board, in the above entitled matter, within forty days from this date as required by Rule 38, as amended.

/s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court
of Appeals for the Fifth Circuit.

DATED:
August 28, 1956.

ANSWER OF BETTER MONKEY GRIP COMPANY, RESPONDENT, TO PETITION FOR ENFORCEMENT

(Filed: September 17, 1956)

United States Court of Appeals for the Fifth Circuit

No. 16278

National Labor Relations Board,
Petitioner,

versus

Better Monkey Grip Company,
Respondent.

To the Honorable Judges of United States Court of Appeals for the Fifth Circuit:

Now comes Better Monkey Grip Company, Respondent, in the above entitled and numbered proceeding, and files this its answer to the petition for enforcement of an order of the National Labor Relations Board filed herein by the National Labor Relations Board, and Respondent would show the honorable Court as follows:

1.

Respondent admits paragraph (1) of the petition.

2.

Respondent admits paragraph (2) of the petition.

3.

Notwithstanding any of the admissions made in this answer, Respondent specifically denies that the Petitioner has, in law or in fact, any right whatsoever to have its order enforced, and in this connection Respondent would show that the order of the Board, its findings of fact and conclusions of law, and the findings of fact and conclusions of law contained in the Trial Examiner's Intermediate Report are not supported by the substantial creditable evidence on the record as a whole. In this connection Respondent reurges all of the exceptions urged to the Trial Examiner's Intermediate Report and to the findings of fact and conclusions of law contained therein, and likewise to the findings of fact and conclusions of law of the Board as embodied in its decision and order, including, but not confined to, the exceptions as set forth in the Respondent's motion for reconsideration filed before the said Board on the 19th day of July, 1956, and Respondent's motion to remand, also filed with said Board on the said 19th day of July, 1956; and Respondent further excepts to the Board's order denying Respondent's petition for reconsideration and motion for remand. Respondent further excepts to the Board's order dated August 24, 1956, denying Respondent's petition for reconsideration and petition for remand. Wherefore, Respondent prays that the Court deny enforcement of the Board's order in its entirety.

4.

In the alternative, the Respondent urges that this cause be remanded for the taking of additional evidence before the Board, its member, agent or agents on the questions of (1) whether or not Whaley was discharged for cause, and (2) the creditability of Whaley's testimony upon which the Trial Examiner exclusively based his findings and conclusions. In this respect Respondent would show the Court that after the hearing before the Trial Examiner Respondent discovered that in a case filed by the said Whaley a few days after his discharge in the State District Court of Dallas County, Texas, for workmen's compensation, wherein he claimed to be permanently and totally disabled as a direct result of injuries sustained a few days before his discharge, Whaley testified under oath in a deposition that he was discharged by Respondent on the occasion in question because he was physically unable to do the work. The Respondent would further show the Court that as soon as this evidence was discovered, it filed with the Board a comprehensive motion to remand, which included photostatic copies of the pages of said deposition setting out this testimony; nevertheless, the Board failed and refused to remand the case for additional evidence on that subject.

5.

Respondent in this connection would further show that the Trial Examiner's report, which constitutes the entire basis for the Board's decision and order sought to be enforced in this Court, draws findings of fact and conclusions of law from and relies principally upon the sole testimony of the said Whaley to the effect that he was physically able

to perform the work at the time of his discharge. Respondent would show that the proferred evidence as to the sworn testimony of Whaley in the workmen's compensation case above referred to conclusively shows that the testimony of Whaley before the Board constituted perjury, and that thus the findings of fact and conclusions of law of the Trial Examiner and of the Board, and the decision of the Board are based solely upon perjured testimony beyond any question and beyond any doubt.

WHEREFORE, Respondent prays that the Clerk of the Court cause notice of the filing of this answer and alternative request for a remand be served upon the Petitioner and that this Court take jurisdiction of the proceeding, and make and enter upon the pleadings evidence and testimony, and proceedings set forth in the entire certified record of said proceedings, and upon the order set forth and attached to the petition, a decree denying the Petitioner and setting aside the order of the Board, or in the alternative, to remand the case to the Board for the taking of additional evidence as herein requested, and for all other relief, in law and in equity, general and special, to which the Respondent may be entitled.

HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.
Attorney for Respondent
1133 Fidelity Union Life Building
Dallas, Texas

A true copy
Test: JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals, Fifth Circuit
By GILBERT F. GANUCHEAU
Deputy

New Orleans, Louisiana
September 17, 1956

(SEAL)

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

In The United States Court of Appeals
For The Fifth Circuit

No. 16278

National Labor Relations Board,
Petitioner,

versus

Better Monkey Grip Company,
Respondent.

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board - Series 6, as

amended, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL-CIO", the same being known as Case No. 16-CA-814 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

VOLUME I — *CERTIFIED RECORD*

Stenographic transcript of testimony taken before Trial Examiner Arthur E. Reyman on November 8, 1955 ..... 1 - 131

VOLUME II — Pleadings[1]

1. Charge filed by Upholsterer's International Union of North America, AFL on February 21, 1955 132

2. Copy of affidavit of service of charge, mailed February 21, 1955, together with United States Post Office return receipt thereof ..... 133 - 134

3. Order consolidating case with Case No.

[1]Items 1 thru 7 were marked General Counsel's Exhibit 1-A thru 1-G in the proceeding before the Board.

[1]Following the last page of the typewritten transcript, all pleadings have been consecutively renumbered, and thereafter, all exhibits. [These numbers will appear in bold-faced type on the pages of the printed appendix]. The Board's brief will refer to these pages rather than to the pages of the Board's appendix.

16-CA-742, and notice of hearing issued by the National Labor Relations Board on October 13, 1955, together with complaints and copies of charges attached 135 - 147

4. Affidavit of service of complaints, order consolidating cases, and notice of hearing, mailed October 13, 1955, together with United States Post Office return receipts thereof 148 - 149

5. Respondent's answer to complaint sworn to October 18, 1955 150 - 151

6. Copy of order withdrawing complaint and notice of hearing in Case No. 16-CA-742 issued by the Regional Director on November 4, 1955 152

7. Affidavit of service of order withdrawing complaint and notice of hearing in Case No. 16-CA-742, mailed November 4, 1955 153

**8. Copy of Trial Examiner Reyman's Intermediate Report and Recommended Order dated January 11, 1956 154 - 180

**Because of the large amount of typed matter on each mimeographed part of this Report, each page has been divided into two parts. The first half, or lines 1 thru 30, inclusive, constitute one page; the second half, lines 31 to the foot of the page, the following page. The renumbered pages of the Intermediate Report will have the following sequence:

Original Page Number	*Renumbered Page*
1	154
2	155 - 156
3. etc.	157 - 158. etc.

9. Order transferring case to the National Labor Relations Board, dated January 11, 1956 ..... 181 - 184

10. Affidavit of service of Intermediate Report and Recommended Order and Order transferring case, mailed January 11, 1956, together with United States Post Office return receipts thereof ..... 185 - 186

11. Copy of Erratum issued by the National Labor Relations Board on January 16, 1956 187

12. Affidavit of service of Erratum, mailed January 16, 1956, together with United States Post Office return receipts thereof 188 - 189

13. Respondent's exceptions to the Intermediate Report received February 16, 1956 190 - 201

14. Copy of Decision and Order issued by the National Labor Relations Board on April 30, 1956 ..... 202 - 207

15. Affidavit of service of Decision and Order mailed April 30, 1956, together with United States Post Office return receipts thereof 208 - 209

16. Respondent's petition for reconsideration of Board's Decision and Order, and, in the alternative, a motion for remand, submitted July 23, 1956, with Exhibits A thru F attached ..... 210 - 249

17. Order denying Respondent's petition for reconsideration of Decision and Order, and in the alternative, a motion for remand, issued by the National Labor Relations Board on August 10, 1956 250

18. Affidavit of service of Order denying petition for reconsideration and alternative motion for remand, mailed August 10, 1956, together with United States Post Office return receipts thereof 251 - 252

VOLUME III

GENERAL COUNSEL'S EXHIBITS***

G.C. No. 2 A letter dated February 18, 1955, on the letterhead of the Better Monkey Grip Company, addressed to Mr. R. L. Whaley and signed by Mr. L. M. Everett 253

G.C. No. 3 A letter dated July 21, 1954, addressed to Mr. Robert Whaley, signed by Jack Everett 254

G.C. No. 4 (Identified only) A letter dated November 7,

***Other than those enumerated in Volume II, supra.

1955 from Maurice M. Scurry, M. D. and addressed to the National Labor Relations Board 255

RESPONDENT'S EXHIBIT No. 1. Photostat of a petition in the District Court in a suit filed by Robert Whaley against the Traders and General Insurance Co., which is a suit for total and permanent disability, filed on June 2, 1955 256 - 263

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this day of

s/ Frank M. Kleiler
Frank M. Kleiler
Executive Secretary
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

132

CHARGE AGAINST EMPLOYER

United States of America
National Labor Relations Board

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS. — File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
16-CA-814

Date Filed
February 21, 1955

Compliance Status Checked By:
ER

1. Employer Against Whom Charge Is Brought
Name of Employer
BETTER MONKEY GRIP COMPANY

Address of Establishment (Street and number, city, zone, and State)
5320 Harry Hines Blvd.
Dallas 2, Texas

Number of Workers Employed
112

Type of Establishment (Factory, mine, wholesaler, etc.)
rubber products factory

Identify principal product or service
rubber products

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) & (4) of the National Labor
(List subsections)
Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about February 18, 1955, it, by its officers, agents and employees, terminated the employment of Robert L. Whaley, because of his membership and activities in behalf of Upholsterers' International Union of North America,

AFL, a labor organization, and because said Robert L. Whaley, gave testimony under the Act in the matter of *Better Monkey Grip Company*, Case No. 16-CA-742, and at all times since said date, it has refused and does now refuse to employ the above-named employee.

By the acts set forth in the paragraph above, and by other acts and conduct, it by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
Upholsterers' International Union of North America, AFL

4. Address (Street and number, city, zone, and State)
1500 N. Broad St., Philadelphia 21, Pa.

Telephone No.
PO 57671

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
same as above

6. Address of National or International, if any (Street and number, city, zone, and State)

Telephone No.

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By D. H. WOODALL
(Signature of representative or person filing charge)
D. H. Woodall, Director Region 17
2118 Volga Ave., Dallas, Texas
FRanklin 2651
(Title, if any)

February 21, 1955
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80)

133

United States of America
Before The National Labor Relations Board

In the Matter of

Better Monkey Grip Company
Employer

and Case No. 16-CA-814

Upholsterer's International Union of North America, AFL
Petitioner

AFFIDAVIT OF SERVICE OF
CHARGE AGAINST EMPLOYER

DATE OF MAILING February 21, 1955

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document by post-paid registered mail upon the following persons, addressed to them at the following addresses:

Better Monkey Grip Company 101820
5320 Harry Hines Blvd.
Dallas 2, Texas

Subscribed and sworn to before me
this 23rd day of February, 1955
Dorothy L. Murphy, Designated Agent.
NATIONAL LABOR RELATIONS BOARD

134

(Return Receipt Omitted)

135

ORDER CONSOLIDATING CASES
and
NOTICE OF HEARING

(Number and Title Omitted)

On August 25, 1955, the Board remanded Case No. 16-CA-742 to the Regional Director for the Sixteenth Region for rehearing. In addition thereto, charges, pursuant to Section 10 of the Labor Management Relations Act, 1947, 61 Stat. 161, and Section 102.9 of the National Labor Relations Board's Rules and Regulations, Series 6, having been duly filed in Case 16-CA-814, and the undersigned having duly considered the matter, and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33(b) of the Board's Rules and Regulations, that these cases be, and they hereby are, consolidated.

PLEASE TAKE NOTICE THAT on the 8th day of November, 1955, at ten o'clock in the forenoon, in Room 614C, 1114 Commerce Street, in the City of Dallas, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the complaints attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

Copies of the charges upon which the complaints are based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the complaint in 16-CA-814 (the answer to complaint in 16-CA-742 having been previously filed) within ten (10) days from the service thereof and that unless you do so all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

IN WITNESS WHEREOF the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Complaint, Order Consolidating Cases, and No-

tice of Hearing to be signed by the Regional Director for the Sixteenth Region on this 13th day of October, 1955.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
300 West Vickery, Room 2093
Fort Worth, Texas

(SEAL)

137

COMPLAINT

(Number and Title Omitted)

It having been charged by Upholsterer's International Union of North America, AFL, 1500 N. Broad Street, Philadelphia 21, Pennsylvania, under date of February 21, 1955, that Better Monkey Grip Company, 5320 Harry Hines Blvd., Dallas 2, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is, and has been since April, 1951, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the City of Dallas, Texas, and is now and has been at all times herein mentioned, continuously engaged at said place of business, hereinafter referred to as the "Plant", in the manufacture and sale of rubber tire patches, tire tread, rubber mats and related products.

138

2. Respondent, in the course and conduct of its business operations at its Plant during the last twelve months, which period is representative of all times material hereto, purchased raw materials valued in excess of $800,000.00, of which approximately $150,000.00 was shipped in interstate commerce to the Plant from points outside the State of Texas. During the same period, Respondent sold products, consisting principally of rubber tire patches, tire tread, rubber mats, and related products, valued in excess of $1,500,000.00. The entire production of the Better Monkey Grip Company during this period was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Better Monkey Grip Company. The Monkey Grip Sales Company is located at the same address and uses the same warehouse facilities as the Better Monkey Grip Company. During the past twelve months, the Monkey Grip Sales Company sold products valued in excess of $1,700,000.00, of which approximately 50 per cent was shipped in interstate commerce from the Plant to points outside the State of Texas.

3. Copy of the charge hereinabove referred to was served on Respondent by registered mail on February 22, 1955.

4. Upholsterers' International Union of North America, AFL, hereinafter referred to as the Union, is a labor organization within the meaning of section 2, subsection (5), of the Act.

5. Respondent did on or about February 18, 1955, discharge Robert L. Whaley, employed at its said Plant.

6. Respondent has, since the date of discharge listed above in paragraph 5, failed to, refused to and continues to refuse to reinstate said Robert L. Whaley to his former or substantially equivalent position or employment.

7. Respondent did discharge and refuse or fail to reinstate said Robert L. Whaley for the reason that he gave testimony on July 17, 1954, and on January 28, 1955, in a hearing before the Board in "Better Monkey Grip Company and Upholsterers' International Union of North America, AFL, case No. 16-CA-742."

8. By the acts described above in paragraphs 5 and 6, for the reason set forth above in paragraph 7, Respondent did discriminate, and is discriminating in regard to the hire or tenure or terms or conditions of employment of said Robert L. Whaley, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8(a), subsection (4), of the Act.

9. By the acts described above in paragraphs 5 and 6, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of section 8 (a), subsection (1), of the Act.

10. The activities of Respondent, described above in paragraphs 5 and 6, occurring in connection with the operations of Respondent, described above in paragraphs 1 and 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of section 8 (a), subsections (1) and (4), and section 2, subsections (6) and (7), of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this complaint to be signed and issued by the Regional Director for the Sixteenth Region on the 13th day of October, 1955, against Better Monkey Grip Company, Respondent herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
Sixteenth Region

(SEAL)

140

(Charge Against Employer Omitted)

141

NOTICE OF HEARING

(Number and Title Omitted)

PLEASE TAKE NOTICE that on the 20th day of July, 1954 at ten o'clock in the forenoon, in Room 1808, 1114 Commerce St., in the City of Dallas, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that, pursuant to section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of a verified answer to the said Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

IN WITNESS WHEREOF, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Notice of Hearing to be signed by the Acting Regional Director for the Sixteenth Region on this 10th day of June, 1954.

ELMER DAVIS
Acting Regional Director,
National Labor Relations Board
300 West Vickery, Room 2093
Fort Worth, Texas
(Address)

(SEAL)

142

COMPLAINT

(Number and Title Omitted)

It having been charged by Upholsterer's International Union of North America, AFL, 1500 N. Broad Street, Philadelphia 21, Pennsylvania, under dates of March 29, 1954 and April 6, 1954 that Better Monkey Grip Company, 5320 Harry Hines Blvd., Dallas 2, Texas, hereinafter referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred

to as the Board, by the Regional Director for the Sixteenth Region of the Board, hereby alleges as follows:

1. Respondent is, and has been since April, 1951, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the City of Dallas, Texas, and is now, and has been at all times herein mentioned, continuously engaged at said place of business, hereinafter referred to as the "Plant" in the manufacture and sale of rubber tire patches, tire tread, rubber mats and related products.

143

2. Respondent, in the course and conduct of its business operations at its Plant, during the last twelve months, which period is representative of all times material hereto, purchased raw materials valued in excess of $800,000.00, of which approximately $150,000.00 was shipped in interstate commerce to the Plant from points outside the State of Texas. During the same period, Respondent sold products, consisting principally of rubber tire patches, tire tread, rubber mats, and related products, valued in excess of $1,500,000.00. The entire production of the Better Monkey Grip Company during this period was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Better Monkey Grip Company. The Monkey Grip Sales Company is located at the same address and uses the same warehouse facilities as the Better Monkey Grip Company. During the past twelve months, the Monkey Grip Sales Company sold products valued in excess of $1,700,000.00, of which approximately 50

per cent was shipped in interstate commerce from the plant to points outside the State of Texas.

3. Copies of the charges hereinabove referred to were served on Respondent by registered mail on March 30, 1954, and April 7, 1954.

4. Upholsterers' International Union of North America, AFL, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2, subsection (5), of the Act.

5. Respondent did, on or about March 24, 1954, discharge J. V. Stone, and did, on or about March 26, 1954, discharge Irene B. Stone, James Clark, Charles Burchett and Nannie Sparks, and did, on or about April 2, 1954, discharge Johnnie W. Hicks, employed at its said plant.

6. Respondent has, since the date of discharge listed above in paragraph 5, failed to, refused to and continues to refuse to reinstate the employees named above to their former or substantially equivalent positions or employment.

7. Respondent did discharge and refuse or fail to reinstate the employees named above in paragraph 5 for the reason that they joined or assisted the union or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

8. Respondent, through its officers, agents and employees, from on or about March 23, 1954, to date, has soli-

cited its employees to withdraw from the Union, and has assisted them in so doing; has kept under surveillance the meeting places, meetings and activities of the Union or the concerted activities of its employees for the purpose of self-organization or improvement of working conditions; has sponsored, maintained, assisted or dominated the "Employee Committee of the Better Monkey Grip Company", and more particularly, the Respondent has done the following:

a. On or about March 25, 1954, and on or about April 15, 1954, Jack Everett, Vice President of Respondent, engaged in surveillance of union meetings being held at the Community House in Lewisville, Texas.

b. On or about April 15, 1954, L. M. Everett, President of Respondent, by and through Jack Everett, Vice President of Respondent, solicited employees of Respondent to withdraw from the Union and assisted them in so doing.

c. Since on or about March 27, 1953, and to the present time, Respondent, by and through L. M. Everett, President, Jack Everett, Vice President, and Garland Talley, Production Superintendent, has sponsored, maintained, assisted or dominated the "Employee Committee of the Better Monkey Grip Company", which is an employee committee established for the purpose of, among other things, and which exists for the purpose of, among other things, dealing with the Respondent, concerning grievances and working conditions.

9. By the acts described above in paragraphs 5 and 6, for the reasons set forth above in paragraph 7, Respondent did discriminate, and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in paragraph 5, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a), subsection (3), of the Act.

10. By the acts described above in paragraph 8, and by each of said acts, Respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a), subsection (1), of the Act.

11. The activities of Respondent, described above in paragraphs 5, 6 and 8, occurring in connection with the operations of Respondent, described above in paragraphs 1 and 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

12. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a), subsections (1) and (3), and Section 2, subsections (6) and (7), of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this Complaint to be signed and issued by the Acting Regional Director for the Sixteenth Region on the 10th day of June, 1954, against Better Monkey Grip Company, Respondent herein.

ELMER DAVIS
Elmer Davis, Acting Regional Director
National Labor Relations Board
Sixteenth Region

(SEAL)

146

(Charge Against Employer Omitted)

* * * *

147

(First Amended Charge Against Employer Omitted)

* * * *

148

(Affidavit of Service Omitted)

* * * *

149

(Return Receipts Omitted)

* * * *

150

ANSWER OF BETTER MONKEY GRIP COMPANY

(Number and Title Omitted)

Now comes Better Monkey Grip Company, a corporation duly organized in the State of Texas, hereinafter called Respondent, and files its answer to the Complaint served upon the Respondent on the 13th day of October, 1955, and would show the honorable Board as follows:

1.

Paragraph 1 of the Complaint is admitted.

2.

Paragraph 2 of the Complaint is admitted.

3.

Paragraph 3 of the Complaint is admitted.

4.

Paragraph 4 of the Complaint is neither admitted nor denied, Respondent having no information relative to the same, but Respondent insists that the burden be placed upon complainant to prove the same.

5.

Paragraph 5 of the Complaint is admitted.

6.

Paragraph 6 of the Complaint is admitted.

7.

Paragraph 7 of the Complaint is specifically denied and the Respondent says that the employee referred to was discharged for good cause and without reference to any testimony he gave in a hearing before the Board in Better Monkey Grip Company and

Upholsterers' International Union of North America, AFL Case No. 16-CA-742.

8.

Paragraph 8 of the Complaint is denied.

9.

Paragraph 9 of the Complaint is denied.

10.

Paragraph 10 of the Complaint is denied.

11.

Paragraph 11 of the Complaint is denied.

WHEREFORE, Respondent prays that upon final hearing hereof it be found that Respondent has not in any wise done the acts complained of, and that these charges be in all things dismissed, and Respondent prays for such other relief, both general and special, in law and in equity, to which it may be found entitled.

BONNEY, WADE
AND STUBBLEFIELD

By HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.

Attorneys for Respondent
1133 Fidelity Union Life Building
Dallas, Texas

THE STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared HERBERT S. BONNEY, JR., the attorney of record in the above cause, known to me and having been by me duly sworn, stated on oath that the facts alleged in the foregoing answer are true and correct.

HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Herbert S. Bonney, Jr. on this the 18th day of October, 1955.

VIRGINIA LOUER
Notary Public,
Dallas County, Texas

(SEAL)

152

ORDER

(Number and Title Omitted)

On September 17, 1955, the Board issued its Decision and Order Remanding Case to Regional Director in Case No. 16-CA-742. This Order provided, among other things, that a new hearing be held, or that the Regional Director make such other disposition of the case as he deemed advisable under the circumstances.

On October 13, 1955, the Complaint in Case No. 16-CA-814, together with Notice of Hearing and Order Consolidating Cases 16-CA-742 and 16-CA-814 was issued. Subsequent thereto, on November 4, 1955, all of the parties entered into a Settlement Agreement in Case 16-CA-742; said Settlement Agreement was approved by the Regional Director on November 4, 1955.

After due consideration of all the aspects of this matter, and in order to effectuate the purposes and policies of the Act;

IT IS HEREBY ORDERED, pursuant to Section 102.18 of the Board Rules and Regulations, and the Decision and Order of the Board remanding the case to the Regional Director hereinabove referred to, as follows:

The Complaint and Notice of Hearing in Case 16-CA-742 is hereby withdrawn subject to compliance with the Settlement Agreement herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, Regional Director
National Labor Relations Board
Suite 2093, 300 West Vickery
Fort Worth 4, Texas

Dated at Fort Worth, Texas,
on the 4th day of November, 1955.
(SEAL)

153

(Affidavit of Service Omitted)

154

IR-819
Dallas, Texas

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

(Number and Title Omitted)

Statement of the Case

This is a proceeding under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136 *et seq.*, 29 U.S.C., Supp. I. Sec. 141 *et seq.*, hereinafter called the Act.

On February 21, 1955, the Upholsterers' International Union of North America, AFL-CIO (hereinafter sometimes called the Union),[1] filed a charge against the Better Monkey Grip Company, the Respondent herein, alleging that the Respondent as an employer "has engaged in and is engaging in unfair labor practices" within the meaning of Section 8

[1]After this case was begun, the American Federation of Labor and the Congress of Industrial Organizations merged into one; the Trial Examiner hereby, by independent action, amends the name and style of the charging party.

(a), subsections (1), (3); and (4) of the Act, and as a basis of the charge the Union asserted that on or about February 18, 1955, the Respondent terminated the employment of Robert L. Whaley because of his membership and activities in behalf of the Union, and because he gave testimony under the Act in a prior Board proceeding; and that the Respondent "at all times since said date" has refused to employ him.

On October 13, 1955, the General Counsel of the National Labor Relations Board, through the Regional Director for the Sixteenth Region caused a complaint to be issued against the Respondent, which refers to the charge of the Union, and asserts that the Respondent, by the discharge of Whaley and its refusal and failure to reinstate him to his former or substantially equivalent position or employment, for the reason that Whaley "gave testimony on July 17, 1954, and on January 28, 1955, in a hearing before the Board in 'Better Monkey Grip Company and Upholsterers' Union of North America, AFL, Case No. 16-CA-742,'" has contravened and now is in violation of Section 8 (a), subsections (4) and (1) of the Act. The Respondent, by its attorney, interposed a timely answer to the complaint, denying that it had violated the Act in the respects alleged, and asserting that Whaley "was discharged for good cause and without reference to any

testimony he gave" in the prior proceeding (Case No. 16-CA-742). Case No. 16-CA-742 was brought on to hearing before Trial Examiner Whittemore on a complaint issued for

the General Counsel by the Regional Director on June 10, 1954; it concerned alleged contraventions of Section 8 (a), subsections (1) and (3) of the Act by the Respondent. The case was heard on July 17 and July 19, 1954, and on August 27, 1954, the Trial Examiner issued his Intermediate Report (I.R. 518). Thereafter, upon a motion of the Respondent to remand, further hearing took place before the same Trial Examiner on January 27 and 28, 1955; he issued his Supplemental Intermediate Report on February 9, 1955, (I.R. 639). On September 17, 1955, the Board issued its Decision and Order remanding Case No. 16-CA-742 to the Regional Director with instructions that a new hearing be held or that the Regional Director make such other disposition of the case as he deemed advisable under the circumstances. On November 4, 1955, all of the parties entered into a Settlement Agreement, approved by the Regional Director on the same day, and on that day the Regional Director filed and served an Order, providing, among other things, that

> * * * Pursuant to Section 102.18 of the Board's Rules and Regulations, and the Decision and Order of the Board remanding the case to the Regional Director . . .
>
> The Complaint and Notice of Hearing in Case 16-CA-742 is hereby withdrawn subject to the Settlement Agreement herein.

The instant case came on to be heard before the undersigned Trial Examiner on November 8, 1955, at Dallas, Texas, pursuant to an Order Consolidating Cases and Notice of Hearing, issued by the Regional Director under date of October

13, 1955.[2] On the issues raised by the complaint and answer and after disposition of or reservation of ruling on motions, the hearing went

156

forward. At the hearing, the General Counsel and the Respondent were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue orally upon the record and to file briefs, proposed findings of fact and conclusions of law, was afforded the parties. Counsel for the General Counsel argued to the record at hearing, and counsel for the Respondent argued at hearing and subsequently submitted a brief. Arguments and brief have been considered. Motions made by the Respondent to dismiss the complaint, and to strike, on which rulings were reserved, are disposed of below.

Upon the entire record in the case, and from his observation of each witness, the Trial Examiner makes the following:

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[2]The Order Consolidating Cases, it will be noted, was made after the Board's Decision and Order of September 17th, and before the execution of the Settlement Agreement of November 4th between the parties to Case No. 16-CA-742.

At the opening of the hearing herein, counsel for the Respondent moved to dismiss the proceeding on several grounds, one particularly to the whole of the complaint herein, because Case No. 16-CA-742 was consolidated with this case by an order of record and the two then became one case; that the one case was withdrawn by order of the Regional Director dated November 4, 1955, and that thereby the whole consolidated case was withdrawn. The Trial Examiner denied this part of the motion to dismiss on a finding that the Regional Director had followed proper procedure as required by the Rules and Regulations of the Board, and that the Respondent was in no way prejudiced by the withdrawal of the complaint and notice of hearing in Case No. 16 CA-742, after voluntary settlement.

Findings of Fact

I. The business of the Respondent

The Respondent, Better Monkey Grip Company, has been since April 1951, and now is a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 5320 Harry Hines Blvd., in the city of Dallas, Texas, where it is now, and at all times material hereto has been continuously there engaged in the manufacture and sale of rubber tire patches, tire tread, rubber mats, and related products. There the Respondent, in the course and conduct of its business operations during the 12-month period preceding the issuance of the complaint herein, this period being representative of the times material hereto, purchased raw materials valued at in excess of $800,000, of which approximately $150,000 were shipped in interstate commerce to the plant of the Respondent from points outside the State of Texas. During the same period, the Respondent sold products, principally rubber tire patches, tire tread, rubber mats, and related products, valued at in excess of $1,500,000. The entire production of the Respondent during these times was sold to the Monkey Grip Sales Company, a partnership comprised of the president and three vice presidents of the Respondent, using the same address and warehouse facilities as those of the Respondent. The sales during these times of the products of the Respondent were valued at in excess of $1,700,000 of which products approximately 50 percent were shipped in interstate commerce to points outside the State of Texas.

The Respondent is engaged in commerce, and in activities affecting commerce, within the meaning of the Act.

II. The labor organization involved

158

Upholsterers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act, admitting to membership employees of the Respondent.

III. The unfair labor practices as alleged in the complaint

Two main questions of fact must be resolved in the disposition of this case: (1) whether Robert L. Whaley was discharged for (proper) cause, and was discharged (a) because, as a supervisor, he adhered to views contrary to the responsibilities attendant to the proper discharge of his duties and adverse to management; or (b) he was unable to discharge his duties to the satisfaction of his superiors, because of physical disability and inability, combined with an effort on his part to disparage top management through the spreading of ill-founded rumors; or (2) whether the cause of his discharge was because and only because he gave testimony in Case No. 16-CA-742, which was adverse to his employer.[3]

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[3]There seems to be no question raised against the apparent fact that the testimony of Whaley, given on July 19, 1954, and on January 28, 1955, in Case No. 16-CA-742, was adverse to his employer, the Respondent herein. However, the Respondent at the hearing objected to any testimony from Whaley as to what he testified to in the prior proceeding, for the reason that such testimony should be considered as immaterial here, it being an admitted fact that he testified; — objection also was made to a request that this Trial Examiner review the transcript of Whaley's previous testimony. See footnote 8.

To answer these questions, it is necessary briefly to review the history of Whaley as an employee of the Respondent:

159

Whaley was employed by the Monkey Grip Company (a predecessor corporation) in about the year 1939, and was continued in employ by the Better Monkey Grip Company until his employment was terminated by the Better Monkey Grip Company on February 18, 1955. He worked as a receiving clerk and as warehouse foreman, holding the last named position on the date of his discharge. The parties agree and have stipulated that "the person named in the complaint as Robert L. Whaley was employed by the Better Monkey Grip Company as a supervisor within the meaning of the Act."

According to the testimony of Whaley at this meeting, he had sometime in March 1954, become interested in the Union, and had signed a union authorization card; that sometime in April 1954, L. M. Everett, Sr., then president of the Company, approached him in the warehouse and that during a discussion between the two men about the Union, Whaley said that he was in favor of the Union.[4] Whaley further testified that in April 1954, while he was in an office shared by him and Garland Talley, a foreman, he heard Jack Everett, then plant manager, tell Talley that he would fire anyone who signed a union card if it took him 10 years to do it, and "he had a good memory." Two or three days later,

[4] L. M. Everett, Sr. was unable to appear at the hearing herein because of a serious heart condition.

Whaley said that Jack Everett, in the presence of Talley, told them "he knew there was six of them leaders that started this union, and he knew of three of them and if he knew the other three, why, he would let them go now."[5]

Whaley further testified that on September 7, 1954, L. M. Everett, Sr. called him into his office, and asked Whaley "if I would withdraw my statement in saying that I had decided that Jack said what he did in a joking manner or that he didn't mean what he had said," and that he (Whaley) had replied that he could not change his statement; that on September 8th he was called back to Everett's office when he was again requested to change his testimony by Everett and an attorney representing

the Company, and asked if he could not sign a statement to the effect that the remarks he had attributed to Jack Everett were made in a joking manner and that he had not meant what he had said; that he then again refused to change his mind or sign a statement to that effect; and that once more on the following day, September 9th, he told Everett and his attorney that he would not sign the proposed statement. He said that on January 27, 1955, the day before the resumption of hearing on remand, he was asked by the attorney "if I was still — had my mind made up to go through with it like I said I would and wanted to know if I would consider changing my statement, and which I wouldn't do it." Whaley gave testimony the following day, January 28,

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[5]Whaley had testified to the same effect on July 19, 1954, in Case No. 16-CA-742.

1955. According to him no company representative after that time said anything further to him concerning his appearances as a witness in the July and January hearings.[6]

A letter dated February 18, 1955, signed by the president of the Respondent Company,[7] was handed to Whaley on that day:

161

Dear Bob:

As your employment in our organization here is presently unsatisfactory to management, it is hereby terminated as of today.

In lieu of advance notice we are enclosing, in addition to your time through today, two weeks' additional pay. Since you have worked approximately six months since your last paid vacation, we are also enclosing one weeks' unused vacation pay, in line with our vacation policy.

The General Counsel by counsel earnestly contends that the record, by the evidence adduced and on the circumstances shown by the sequence of events between the time

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[6] Each time he testified, Whaley was under subpoena directed to him by counsel for the General Counsel.

[7] Luther M. Everett, Sr. was president of the Respondent Company up until several months before this hearing, at which time he was succeeded in the presidency by Thomas L. Everett; two other sons of Luther M. Everett, Sr. occupied, at the time of the hearing herein, positions as vice president: Luther M. Everett, Jr. as vice president and secretary-treasurer, Jack Luther as plant manager.

when Whaley first testified in July 1954 and the time when he testified in January 1955, together with his discharge shortly after he testified on January 28th, shows that Whaley was discharged by reason of the fact he did testify and because of the adverse nature of his testimony to the case of the Respondent. The General Counsel points out that the statements made by Whaley, both on direct and cross-examination, at the July hearing, were brought to Whaley's attention by representatives of the Respondent almost immediately before September 18, 1954, (the date under which the Respondent moved the Board to remand the case for further hearing, and just after Trial Examiner Whittemore had issued his Intermediate Report on August 27, 1954); and that just prior to the remand hearing Whaley again was interrogated concerning the testimony he previously had given. The General Counsel asserts that "the sequence of events clearly establishes that the reason for discharge was the adverse testimony of the witness [Whaley], and he was discharged just as soon as the Respondent was able to determine that the Trial Examiner would finally hold that the

testimony was adverse."*

*At the hearing, this Trial Examiner was asked by counsel for the General Counsel to officially notice the testimony of Whaley given at the July 1954 and January 1955, hearings in Case No. 16-CA-742. This request first was denied, then upon his reversal of his first ruling, the Trial Examiner agreed to examine the prior record as requested. He has done so, and finds that testimony of Whaley then given substantially is the same as that given in the instant case. See footnote 3.

The Respondent says that Whaley was discharged for cause; — that he had become an unsatisfactory employee because his antagonistic attitude toward management, because he had made mistakes in the performance of his job, that he had spread unfounded rumors to the detriment of management, and apparently was physically and mentally unable to handle his job.

The nature of his duties and responsibilities were described by Thomas H. Everett, now president of the Respondent:

> Q. (By Mr. Bonney). Now, just tell us in some detail what his job involved and how much merchandise and how much responsibility?
>
> A. . . . he was in charge of the warehouse, that is, the warehousing inventory or both, primarily of raw materials and some products in process as well as cartons, labels, that sort of thing. Our purchases would run somewhere in the neighborhood of a hundred thousand or better dollars per month or roughly $1,200,000 a year, well over a million at any rate. His duties, of course, were to properly warehouse those materials. In that part of his job, he was more or less responsible to the production

> manager. He also of course, had to report the receipt of this merchandise, and in accurate detail because there was a great deal of money involved, and a difference, for example between a receiving

report and an invoice which we would receive from our suppliers meant either dollars out of our pocket or dollars out of the suppliers' pocket, so there is a good deal involved, and in that sense, why, he was responsible to [my] brother Luke who was in charge of the purchasing. The further responsibility within the warehousing itself, was of course, proper handling and storage of the goods because, or, rather, in order to prevent damage to the material, particularly I would say to cartons, containers which eventually would be going out to our customers in forms of finished merchandise.

According to the testimony of Luther M. Everett, Jr., vice president and secretary-treasurer of the Respondent Corporation, he, at the time of the hearing herein, had known Whaley for some 17 years. He said that Whaley received the materials purchased by him, and turned in records to confirm receipt of the materials that were supposed to have been shipped to the Company. From the testimony of Luther M. Everett, Jr., it clearly appears that Whaley was not required to keep a complete inventory record, but was definitely charged with the keeping of a system of accounting for materials on hand, on cards, which reflected or was intended to reflect the materials received and warehoused, principally in turning in "stock on hand" reports; — a sort of current system of check of materials on hand. It is asserted by the Respondent that Whaley, in the keeping of these records, was derelict in the following respects; the errors committed involved his report of materials received by quantity as distinguished from those which were invoiced and checked in, and that these errors primarily in-

volved errors in computation — that is, in multiplication or addition. For example, Whaley

is accused of reporting bags as being 50-pound bags instead of 100-pound bags, or perhaps 200 bags instead of 50 bags; that the errors in computation following these would give an erroneous result on the total of the materials received or in the warehouse. Luther M. Everett, Jr., stated that Whaley was not responsible for a complete inventory check. Upon the reception of parol evidence on these facts, counsel for the General Counsel strongly objected on the ground that the records asserted by the Respondent to have been wrongly made by Whaley would be the best evidence of whether or not Whaley was derelict in his duties in this respect. The Respondent did not see fit to introduce into evidence the records which might have shown these errors. The Trial Examiner received the testimony with a statement to the effect that, although the records might be the best evidence, he would regard the verbal testimony of Luther M. Everett, Jr., according to the weigh he thought should be accorded to it. He gives it little weight. It is asserted that Whaley should have made, column by column, on the records kept by him, whether the freight was prepaid or collect; he should have shown the number of units received, the quantity of material in each of these units and the amount of that quantity which multiplied then should have shown the total quantity then received. He was required to show a full description of the material received — not the full description shown on the invoice, but according to common terminology used in the plant — the name of the shipper, the truck line which delivered the product or ma-

terial and the gross weight of the entire shipment, including tare. In most cases, a receiving report was made for each invoice of goods delivered and billed for although, according to Luther M. Everett, Jr., one or two of these suppliers to the Company would present several invoices covering one shipment.

Whaley is said to have been warned concerning his failure to keep proper records. Admittedly, Whaley never was warned, in the sense of being charged with dereliction of duty, about these alleged failures, until after about September 1954. Luther M. Everett, Jr. could not remember whether

or not these omissions in performance of duty had been called particularly to the attention of Whaley, although he said that during the two or three months prior to Whaley's discharge there was an increase in the number of errors previously made by Whaley in his record-keeping.

Sometime early in the year 1954, at about the time Whaleys' interest in the Union had become known, he was charged with having before then spread false rumors concerning his health and his apparent inability to do his job: he was said to have remarked at various times that "the Everetts' had ruined his health."

Under date of July 21, 1954, Jack Everett, plant manager, addressed a letter to Whaley:

It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.

These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.

We feel that these malicious statements are harmful to the company and employees to the extent that we must insist they be stopped.

Any repetition of such actions will force us to request your resignation.

166

One of the so-called false rumors brought to the attention of management of the Respondent in early 1954, as noted above, was the asserted one that Whaley was accusing the "Everett family" of having ruined his health — that the Everetts (meaning L. M. Everett, Sr., and his sons, were responsible for a back injury sustained by Whaley during the course of his duties . . . Whaley denies making such a statement.

Counsel for the Respondent introduced in evidence the complaint in a matter styled *State of Texas* v. *Traders and General Insurance Co.* [District Court of Dallas County, filed June 2, 1955], a compensation case, in which Whaley,

by an attorney, alleged in alternative terms complete or partial inability to perform his duties as a workman. The Respondent apparently, by the use of this document, seeks to discredit the testimony of Whaley and at the same time show that Whaley admitted his inability to perform his job. Whaley was an hourly-rated and not a salaried employee. According to witnesses for the Respondent, not contradicted by him, he was responsible for the receiving and warehousing of many thousand dollars worth of merchandise, the keeping of records, and some physical effort involved in the handling of materials and products.[9] It appears that about 10 days before his discharge, while he was engaged in the operation of a fork-lift truck, he fell and sustained injuries which aggravated a previous weakness of his back. It seems reasonable to believe that Whaley, after his discharge, being out of employment, had a perfect right to assert a claim for compensation, as he did. This Trial Examiner cannot find that his credibility is impaired by the claims made in the complaint filed on his behalf for compensation, nor can he find that the allegations of that complaint constitute an admission by Whaley that he was unable to perform

his duties in the job previously assigned to him by his employer. The Trial Examiner, because of the troublesome questions of credibility as they developed at the hearing, gave very close attention to the demeanor of the several witnesses, including Whaley, Thomas Everett, and Luther

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[9]The Respondent says, in its brief, that Whaley "had charge of receiving and warehousing and accounting for over $1,200,000 in raw materials per year." The record herein reflects the accuracy of this statement.

M. Everett, Jr., and has concluded and finds that at the time of his discharge Whaley was ready, able, and willing to perform his duties as a supervisor as described by the Everett brothers.

The false rumors said to have been spread by Whaley appear to be exaggerated. The effort to impair his reputation for truth and veracity failed, so far as the Trial Examiner is concerned. At the hearing Lila Belle Magee was called as a witness by the Respondent. Her testimony was to the effect that she had been told by another witness called by the Respondent, Altha Lucille Cribbs, that Whaley had told Cribbs that the Union had gotten the plant a pay raise and that it would be effective on the next paycheck. Cribbs, who had preceded Magee as a witness, testified that Whaley had told her, and another girl that "if the Union had helped any way it had brought us a raise"; that she was not in favor of the Union; and that the reputation of Whaley for truthfulness around the plant was bad. On cross-examination, it developed that Cribbs did not know what "reputation" means and her only contribution was that she would not believe Whaley. Whaley is to be believed; Cribbs is not. The complaints of management, regarding each one of the so-called rumors spread by Whaley, and the shallow evidence in support of such rumors, impels the Trial Examiner to find that these reasons for finding Whaley an unsatisfactory employee, together with his alleged inability to properly perform his duties, were not the real reasons which moved the Respondent to terminate his employment. The history of Whaley as an employee of the Respondent and its predecessor corporation, and the sudden interest of the Respondent's officials in his ability to perform his work

in a satisfactory manner after he openly expressed his favor for the

168

Union, suggests only one conclusion: He was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act. The case against him for discharge for cause is too flimsy: the testimony regarding his so-called inability to perform his duties, suddenly discovered about the time his interest in the union became known, and the accusations against him for spreading false rumors made after he had testified in July 1954, are too pat. The Trial Examiner so finds.

The Respondent earnestly urges in its motion to dismiss that on the evidence, in order for the General Counsel to show a *prima facie* case, he must prove not only that Whaley was discharged for having testified in a Board hearing, but that such discharge was (1) known to other persons who were protected by Section 7 of the Act; (2) that their rights, guaranteed under Section 7, were put in jeopardy, or prejudiced; and (3) that it is not believed on the part of the Respondent that it was the intention of the framers of the Act to provide that the mere discharge of a supervisor who previously had testified in a Board hearing is a violation of Section 8 (a) (1) *per se*. The Respondent says in its brief that the General Counsel has proved only the following facts:

1. That Whaley testified at two hearings; one on July 19, 1954, and one on January 28, 1955.

2. That his testimony was adverse to the Respondent.

3. That he was discharged on February 18, 1955.

4. That the actions of L. M. Everett, Sr. and his attorney in their efforts to persuade Whaley to "tell the truth" raises a question as to whether or not this evidence makes a *prima facie* case of a violation of Section 8 (a) (1) "bearing in mind that Whaley was a supervisor." The Respondent says that there is no evidence that there was any union activity since the first union organization movement early in the year prior to Whaley's discharge; that there is no evidence that anyone ever knew of or was affected by his discharge; and that there is no evidence that he was discharged for having testified. The Respondent argues that the only way

that it could be held that he was discharged for having testified would be to draw an inference from his own [Whaley's] testimony. The Respondent by able counsel most strongly urges, too, that if the burden of proof resting upon the General Counsel to make a case of unlawful discharge *prima facie* has been met, the Respondent has effectually overcome the facts presented by the General Counsel by the testimony of witnesses for the Respondent. The Trial Examiner does not agree. He agrees with the General Counsel that the circumstances too strongly show that Whaley was discharged because he testified at a Board hearing to the detriment of the case of his employer. The findings of fault against Whaley, and the time conditions as shown by the record herein surrounding the entire con-

troversy, seem conclusively to show that he was fired because he testified, under subpoena, against his employer.

The Contravention of Section 8 (a) (4) of the Act

It is provided in Section 8 (a) of the Act that "it shall be an unfair labor practice for an employer — . . .

> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; . . .

The Respondent says that Whaley was not an "employee" within this provision; that it has not been alleged or proved that, before his discharge, he was an employee as so defined in Section 2 (3) of the Act, and refers to the positive definition of "employee" contained therein in support of argument to the effect that the Congress intended, in writing this definition, that all supervisors, as a part of management, should be without the protection of the Act even if they filed charges (or a charge), or gave testi-

mony under the Act. The General Counsel says in effect that any person, from the lowliest foreman to the top of management, who has been discharged for having filed charges or given testimony in a Board proceeding, is entitled to the protection of Section 8 (a) (4); and that the word "employee" as used in this Section 8 (a) (4) is to be considered as including any person or individual defined as a supervisor by Section 2 (11) of the Act.

The pertinent provisions of Section 2 (3) are these:

> (3) The term "employee" shall include any employee, . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice . . . but shall not include any individual employed . . . as a supervisor . . .

It seems to the Trial Examiner that, although the definition of "supervisor"[10] plainly shows the intent of the Congress to distinguish between a person or individual employed as one properly eligible to be included within a bargaining unit (an employee) and a person or individual employed as a part of management (a supervisor), that the distinction so made by definition was meant to remove the supervisor (as a member of management) from the obligation to be represented by a bargaining representative chosen by a majority of rank-and-file employees within an appropriate bargaining unit. It hardly seems possible that the framers of

the Act would choose to imply, but not say, that any super-

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[10] Section 2 (11) of the Act provides:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

visor, called upon under subpoena to give testimony in a Board proceeding, could be discharged for so testifying, or run the risk of contempt proceedings against him for refusing to respond to a subpoena or to testify."

The legislative history of the amended Act shows that the concern of the Congress, in amending the Act in 1947, in connection with "employees" and "supervisors," was to remove supervisors from the influence of the pressures that might be exerted upon them by labor representatives or so-called rank-and-file workers, and to assure them the independence of action necessary to the performance of their duties as members of management. Representative Hartley submitted a report for the House Committee on Education and Labor (Report No. 245, 80th Congress, 1st session) in which, in a comprehensive review of the status of foremen (pp. 12-17), emphasis was placed solely on the place of the supervisor in the scheme of collective bargaining. It there was written (p. 15):

> "If management is to be free to manage American industry as in the past and to produce goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the rank and file.*"

"See Section 11 of the Act and Section 102.31 of the Rules and Regulations of the Board, Series 6, as amended.

Senator Taft, for the Senate Committee on Labor and Public Welfare submitted a report (Report No. 105, 80th Congress, 1st session), in which supervisory personnel was discussed (pp. 3-5). There it was written (p. 3):

> A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise."

The tenor of each report, in full, shows that the concern of each house of the Congress was directed to the organization of supervisors into collective bargaining groups with the employees they were required to supervise. Each report carefully points out that the proposed legislation would not prevent anyone from organizing nor (as stated in the Taft report) prohibit any employer from recognizing a union of foremen. So far as the Trial Examiner can find, no word appears in the committee reports, or was said on the floor of either house of Congress, which would indicate any intention to remove the protection of Section 8 (a) (4) from an employee of any employer called to testify under the Act. Member Murdock, in his dissent in *Modern Linen and Laundry Service*, 114 NLRB No. 41 (D. 9483) said in part:

in connection with the discharge of a supervisor after he had given testimony under the Act:[12]

"The Board did in fact assert its jurisdiction over Respondent in a prior case, in which a hearing was conducted by a Trial Examiner designated by the Board. The Board did subpoena complainant to testify, and complainant testified against the

interests of Respondent. Complainant was discharged by Respondent less than two weeks after his testimony in the prior case was taken. The Trial Examiner found, and for the purpose of considering complainant's Motion, it must be accepted as a correct finding, that Respondent discharged complainant in violation of Section 8 (a) (4) of the Act because of his testimony in the prior proceeding before this Agency. . . .

"An orderly and responsible administration of the Act requires that the Board protect complainant and other witnesses appearing before it, to the limit of its powers. To do less undermines the authority of the Board and will result in difficulty in getting witnesses to testify in the future with the inevitable result that the Board will be hampered in its efforts to effectuate the policies of the Act."

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[12]This was written on denial by a majority of the Board for reconsideration of the Decision and Order of the Board in the case reported in 110 NLRB 1305.

The Trial Examiner here is in accord with the meaning of the law as so aptly expressed by Member Murdock, especially since it appears that the refusal of the majority to reconsider that case was based solely upon their refusal to assert jurisdiction. In the instant case, jurisdiction previously was taken in Case No. 16-CA-742, on practically identical facts concerning the business of the Respondent and its business as it affected and now affects commerce. Nor is jurisdiction contested by the Respondent. To refuse to Whaley the protection intended to be afforded by the Act, after giving testimony, would be to fail to afford the protection to a witness which the Act contemplates.

The Trial Examiner finds that the motivation for the discharge of Whaley was because he was called to testify and did testify in Board proceedings on July 19, 1954, and again on January 28, 1955. The preponderance of proof shows that except for his expressed sympathy toward

the Union early in the year 1954, and his testimony, he would not have been discharged. His duties were such as to require close attention to his job, which he seems to have given until he was found to be "unsatisfactory" to top management.

The question as to whether a supervisor is entitled to the protection of Section 8 (a) (4) of the Act is here answered in the affirmative. In the circumstances of this case, Whaley clearly is entitled to the protection of Section 8 (a) (4) of the Act. His discharge by the Respondent was in contra-

vention of this subdivision of Section 8 (a), and the Trial Examiner so finds.[13]

The Violation of Section 8 (a) (1)

Having found that the motivation for the discharge of Whaley was because he gave testimony under the Act, the Trial Examiner also finds that his discharge resulted in the discouragement of the union activities of other employees of the Respondent. Whaley testified at a public hearing before the Board, and it must be inferred that many of the employees of Respondent, particularly those interested in joining the Union, were well aware of the fact that he had so testified. These employees, not being apprised of any good and valid reason for the discharge of Whaley, would necessarily conclude that his discharge was because he did testify, and that his discharge constituted warning to them by the Respondent to discontinue their interest in or activities on behalf of the Union. The Trial Examiner therefore finds that the discharge occurred in circumstances which justify a finding that the employer (Respondent) by its conduct interfered with and coerced its employees in violation of Section 8 (a)

(1) of the Act. In *N. L. R. B.* v. *Vail Manufacturing Co.*, 158 F. 2d 664 C.A. 7 (cert. den. 331 U. S. 826), the Court, in sustaining the Board's finding that the employer had vio-

[13] Cf. *John Hancock Mutual Life Insurance Co.* 92 NLRB 122, affirmed 191 F. 2d 483, 28 LRRM 2236; *Inter-City Advertising Co.*, 89 NLRB 1103, reversed on the facts at 190 F. 2d 420.

lated Section 8 (a) (1) and (3) of the Act with respect to the discharge of two supervisors, and in answering the contention of the Respondent in that case that the discharges neither encouraged nor discouraged membership in a labor organization, because of lack of knowledge of the discharges on the part of other employees, pointed out that with such knowledge, the other employees would have every good reason to fear the same treatment given to the supervisors if they showed a friendly attitude toward the Union. See also *Inter-City Advertising Co.*, 89 NLRB 1103, and *Talladega Cotton Factory*, 106 NLRB 295. In affirming the decision of the Board in *Talladega Cotton Factory*, the Court of Appeals for the Fifth Circuit found violations of Section 8 (a) (1) and (3) of the Act in the discriminatory demotion of one supervisor and the discharge of another for alleged union activities.

Concluding Findings

The discharge of Whaley for giving testimony under the Act, with the resulting implication to rank-and-file employees that their employer would not hesitate to discharge any of them in similar case, and that it was so vigorously opposed to union activity, constituted an interference with the rights of these employees, and a direct interference with the right of the Board to require the attendance of witnesses before it in a formal proceeding.

The discharge of an employee, supervisor or not, intended to influence or to prevent the giving of testimony in a Board hearing on the part of other employees, plainly is against the policy of the Congress in entrusting the enforcement

of the Act to the Board. *N. L. R. B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (C. A. 5); *N. L. R. B.* v.

Vail Manufacturing Co., 158 F. 2d 664 (C.A. 7), cert. den. 331 U. S. 835.

In *Talladega Cotton Factory*, the Court said that it saw "no reason why the Board in the exercise of its statutory discretion does not have the same remedial power to redress acts of indirect interference and restraint of ordinary employees through discharge of supervisors, as it admittedly has to redress acts of direct interference and restraint with the right of the same employees to uninhibited self-organization." The Court went on to say that a contrary claim "evinces undue preoccupation with the statutory definition [of supervisor] rather than with the underlying purpose and intent of the Act as a whole. . . ."

The motions made on behalf of the Respondent, to dismiss and to strike, are hereby denied.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relations to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action which the Trial Examiner finds necessary to effectuate the policies of the Act.

177

It has been found that the Respondent discriminated in regard to the hire and tenure of employment of Robert L. Whaley on February 18, 1955, by discharging him for having given testimony under the Act. The Trial Examiner therefore recommends that the Respondent offer to Robert L. Whaley immediate and full reinstatement to him to his former or substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of such discrimination by payment to him of a sum of money equal to that which he would have earned as wages or salary from the date of his discriminatory discharge on February 18, 1955, to the date of the offer of reinstatement less his net earnings during such period in accordance with the formula set out in *F. W. Woolworth Co.*, 90 NLRB 289.

It has also been found that the Respondent by the discharge of Robert L. Whaley has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act. It will therefore be recommended that the Respondent cease and desist therefrom.

On the basis of the foregoing findings of fact and upon the entire record, the Trial Examiner makes the following

Conclusions of Law

1. By discriminating in regard to the hire and tenure of employment of Robert L. Whaley by discharging him on February 18, 1955, thereby discouraging membership in a labor organization admitting employees of the Respondent to membership, and thereby discouraging membership in other labor organizations, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a), subdivision (1) of the Act.

2. In discharging Robert L. Whaley on February 18, 1955, the

Respondent discharged him for the reason that he gave testimony under the Act, and thereby engaged in an unfair labor practice within the meaning of Section 8 (a), subdivision (4) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8 (a), subdivision (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 subdivisions (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, the Trial Examiner recommends that Better Monkey Grip Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of its employees in any labor organization admitting them to membership, by discriminating in regard to the hire or tenure of employment of its employees or by discriminating in regard to any term or condition of employment to discourage membership therein;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Trial Examiner finds will effectuate the policies of the Act:

(a) Make whole Robert L. Whaley for any loss of pay he may have suffered by reason of the Respondent's dis-

crimination against him, in the manner provided in the Section of this Intermediate Report entitled "The remedy";

(b) Post in conspicuous places at its Dallas, Texas, plant, and in all places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's duly authorized representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notice shall not be altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Sixteenth Region in writing, within twenty (20) days from the date of receipt of this recommendation, what steps the Respondent has taken to comply herewith.

Unless the Respondent shall within twenty (20) days, notify the said Regional Director in writing that it will comply with the recommendations contained herein, it is recommended that the National Labor Relations Board issue an order requiring the Respondent to take such action.

Dated at Washington, D. C., this 11 day of January 1956.

ARTHUR E. REYMAN
Arthur E. Reyman
Trial Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL OFFER to Robert L. Whaley immediate and full reinstatement to his former or substantially equivalent position without prejudice to any rights or privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge on February 18, 1955.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condi-

tion of employment against any employee because of membership in or activity on behalf of any labor organization.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

181

(Order Transferring Case to the National Labor Relations Board Omitted)

* * * * *

182

(Notice Omitted)

* * * *

183, 184

(Excerpts, Series 6 Omitted)

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185

(Affidavit of Service Omitted)

* * * *

186

(Return Receipts Omitted)

* * * *

187

ERRATUM

(Number and Title Omitted)

The Intermediate Report and Recommended Order in the above-captioned matter, issued January 11, 1956, by the undersigned Trial Examiner, is incomplete in that, through inadvertence, the following clause was omitted in that part of the Intermediate Report entitled "Recommendations," which clause should have immediately followed the words "The remedy" in line 7, page 14 thereof:

"; and offer immediate and full reinstatement to him to his former or substantially equivalent position without prejudice to any rights or privileges previously enjoyed by him."

ARTHUR E. REYMAN
Arthur E. Reyman
Trial Examiner

Dated: January 16, 1956.

188

(Affidavit of Service Omitted)

* * * *

189

(Return Receipts Omitted)

* * * * *

UNITED STATES OF AMERICA

Before the

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

Case No. 16-CA-814

BETTER MONKEY GRIP COMPANY,

and

UPHOLSTERER'S INTERNATIONAL UNION OF NORTH AMERICA, A. F. L.

EXCEPTIONS OF BETTER MONKEY GRIP COMPANY TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER AND TO THE RULINGS OF THE TRIAL EXAMINER AT THE HEARING

BETTER MONKEY GRIP COMPANY,
Respondent.

HERBERT S. BONNEY, JR.
1133 Fidelity Union Life Building,
Dallas, Texas,
Counsel for Respondent.

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191

UNITED STATES OF AMERICA

Before the
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EXCEPTIONS OF BETTER MONKEY GRIP COMPANY TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER AND TO THE RULINGS OF THE TRIAL EXAMINER AT THE HEARING

Now comes Better Monkey Grip Company, Respondent in this proceeding, and makes the following exceptions to the Trial Examiner's Intermediate Report and Recommended Order and would show the honorable Board as follows:

I.

The Trial Examiner, Arthur E. Reyman, filed his Intermediate Report and Recommended Order with the Board,

192

2

and this proceedings was transferred to the National Labor Relations Board on the 11th day of January, 1956. A copy of the Intermediate Report and Recommended Order and a copy of the Order of Transmittal of the case to the National Labor Relations Board were served upon Better Monkey Grip Company by registered mail on the 12th day of January, 1956. Respondent timely filed a written request for extension of time to file exceptions and brief. The Board extended the time to file exceptions and Brief to February 17, 1956.

II.

The Respondent, Better Monkey Grip Company, will be referred to in these Exceptions as "Respondent."

III.

Respondent excepts to the overruling of its Motion, presented orally at the hearing, as set out on page 41, lines 28 to 40 of the Trial Examiner's Report, said Motion also being transcribed in the official Record of the proceedings on page 8, said Motion being to dismiss the proceedings because the complaint in Case No. 16-CA-814 was consolidated by

order of the Regional Director presented in evidence with Case No. 16-CA-742, which case was by further order of the Regional Director in evidence in this case withdrawn, thereby disposing of both Case No. 16-CA-814 and 16-CA-742; and said Motion being further to dismiss the entire complaint because it was not alleged that Whaley was an employee of the company, as defined in the Act;

193

3

said Motion was further to dismiss paragraph 8 of the complaint because neither the complaint nor paragraph 8 alleged that Robert L. Whaley was an employee, because such portion of the complaint relied upon Section 8 (a) (4) of the Act, which applies only to an employee as defined in the Act. Respondent further excepts because these motions were overruled when they were reurged at the conclusion of the proceedings and after the evidence showed that it was a stipulated fact that Whaley was a supervisor of Respondent as defined in the Act.

IV.

Respondent excepts to the Trial Examiner's interpretation of the evidence as recited on pages 42 to 48 of his Intermediate Report, because the same is not supported by the substantial evidence.

V.

Respondent excepts to the Trial Examiner's interpre- in taking judicial notice of the testimony of the witness Whaley in Case No. 16-CA-742, and particularly excepts to the Trial Examiner reading the evidence in Case No. 16-CA-742. The objection of Respondent to the introduction of the testimony of Whaley in Case No. 16-CA-742 and the ruling of the Trial Examiner were set out in the official Record on pages 16 and 19. The Trial Examiner has pointed out on page 47 of the Intermediate Report, lines 27 to 34, that he has taken cognizance of the testimony in the other case and has compared it with the testimony in this case. In this connection we would point out that the

Intermediate Report in Case No. 16-CA-742 was excepted to on the grounds of prejudice of the Trial Examiner, and the Board found that the Trial Examiner was prejudiced in his Report and remanded the case for a rehearing before a different Trial Examiner. We would point out that the present Trial Examiner has now gone into a record which is made under the supervision of the prejudiced Trial Examiner, and the Respondent has no assurance that the prejudice reflected in that Record is not now reflected in the Intermediate Report of the present Trial Examiner.

VI.

Respondent excepts to the interpretations of the evidence by the Trial Examiner, as shown on page 49. Particularly Respondent excepts to a statement of the Trial Examiner on line 8, page 51, that Whaley was admittedly never warned, because it is contrary to the evidence.

VII.

Respondent excepts to the conclusions drawn by the Trial Examiner in his Report on page 52, lines 32 to 33, page 53, and page 54, lines 1 to 4, wherein the Trial Examiner concludes that even though an exemplified copy of a petition in the District Court of Dallas County, Texas, the original of which was filed by Whaley's attorney in a suit for Workman's Compensation, undisputedly showed that Whaley claimed he was permanently disabled, or in the alternative partially and permanently disabled from performing any work, that nevertheless, Whaley should be believed when

he said that he was able to discharge his duties at the time he was discharged.

VIII.

Respondent excepts to the finding of the Trial Examiner on page 54, lines 6 to 32, and page 55, lines 1 to 14, of his Report, that the false rumors stirred by Whaley were ex-

aggerated and that the case against Whaley was too flimsy and that the accusations after he testified against Respondent in the July hearing were "too pat," because such findings are contrary to and not supported by the substantial evidence.

IX.

Respondent excepts to that portion of the Report on page 55, lines 28 to 32, page 56, and page 57, lines 1 to 2, wherein the Trial Examiner overrules the Motion of Respondent presented at the conclusion of General Counsel's testimony, as well as at the end of the trial, to dismiss because General Counsel had not made a prima facie case as a violation of 8 (a) (1).

X.

Respondent excepts to the findings and conclusions of the Trial Examiner and to that part of his Report entitled "The Contravention of Section 8 (a) (4) of the Act," contained on pages 57 to 63 of the Report, particularly where the Trial Examiner says on page 62, lines 28 to 32, and on page 63, lines 1 to 2, that a supervisor is entitled to protection of 8 (a) (4) of the Act, that Whaley as a supervisor was clearly entitled to

such protection of 8 (a) (4) of the Act, and that his discharge by Respondent was in contravention of such Subdivision of Section 8 (a) (4).

XI.

Respondent excepts to the statement in lines 5 to 8, page 62 of the Report, because the Trial Examiner again relies on facts in Case No. 16-CA-742 upon which to base his findings and conclusions: "In the instant case, jurisdiction previously was taken in Case No. 16-CA-742 on practically identical facts."

XII.

Respondent excepts to the Trial Examiner's findings found on page 63, lines 6 to 33, and page 64, lines 1 through 16, whereby he concludes that Respondent was in violation of 8 (a) (1) of the Act in the discharge of Whaley, because the pleadings and evidence do not support such finding and conclusion.

XIII.

Respondent excepts to the findings of the Trial Examiner on page 64 of the Report, lines 20 to 32, and page 65, lines 1 through 22, wherein he finds that the discharge of Whaley for giving testimony under the Act constituted an interference of the rights of employees and an interference with the right of the Board to require the attendance of witnesses before it in a formal proceeding; and wherein he concluded that the discharge of an employee, "supervisor or not," intended to influence

or to prevent the giving of testimony in a Board hearing on the part of other employees, and is plainly against the policy of Congress, for the reason that the same is not supported by the evidence and for the reason that as a matter of law a supervisor is not protected under Section 8 (a) (4) of the Act. The action of the Trial Examiner in denying the Motions of Respondent to dismiss and to strike as set out in lines 21 and 22, page 65 of his Report, is excepted to by Respondent.

XIV.

Respondent excepts to the finding that "it was so vigorously opposed to Union activity, constituted an interference with the rights of those employees * * *" (page 64, lines 22-25), because there is *no* evidence to such effect and because the Trial Examiner may have reached said finding from reading the record in Case No. 16-CA-742, over Respondent's objection.

XV.

The finding of the Trial Examiner as set out on page 65, lines 27-through 33, wherein he finds that the activities of the Respondent occurring in connection with the operations of Respondent have a close, intimate, substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstruct-

ing commerce and the free flow of commerce, because there is no evidence to support such finding or conclusion.

198

8

XVI.

Respondent excepts to that portion of the Trial Examiner's Report entitled "The Remedy," wherein he recommends that the Respondent cease and desist from certain unfair labor practices and take certain affirmative action which Trial Examiner finds necessary to effectuate the policies of the Act; to page 66, lines 11 through 24, wherein he states that Respondent discriminated in regard to the hire and tenure of employment of Robert L. Whaley on February 18, 1955, by discharging him for having given testimony under the Act; wherein the Trial Examiner recommends that Respondent offer Robert L. Whaley immediate and full reinstatement to his former, or substantially equivalent position, and make him whole for any loss of pay he may have suffered by reason of such discrimination by paying to him a sum of money equal to that which he would have earned as wages or salary from the date of his discriminatory discharge on February 18, 1955, to the date of the offer of reinstatement, less his net earnings during such period, in accordance with the formula set out in W. F. Woolworth Company, 90 NLRB 289, for the reason that such findings and recommendations are not in accordance with the testimony in the Record, the substantial evidence being that Robert L. Whaley was discharged for cause, that he was a supervisor and not entitled to

protection under Section 8 (a) (4) of the Act, and since there is no showing by any evidence that Robert L. Whaley

has lost any wages or salary by reason of his discharge, or that he has attempted to get other employment, but in fact the Record shows that Whaley, by his own admission in his Workmen's Compensation suit, declared himself totally and permanently disabled and unable to perform the work for which he had been employed.

XVII.

Respondent excepts to page 66, lines 26 through 30 of the Report, wherein it says that it has been found that Respondent by the discharge of Whaley has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and wherein it is said that it will be recommended that Respondent will cease and desist therefrom, for the reason that the evidence does not support such finding or recommendation.

XVIII.

Respondent excepts to the following conclusions of law recited on page 67, lines 3 through 30 of the Report, to wit, (a) wherein he concludes that the Respondent is engaging in unfair labor practices within the meaning of Section 8 (a) (1); (b) wherein he concludes that Respondent engaged in unfair labor practice within the meaning of 8 (a)

(4) of the Act; (c) wherein he concluded that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the

200

10

Act by interfering with, restraining and coercing its employees; (d) wherein he concludes that such unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2, Subdivision 6 and 7 of the Act.

The aforementioned conclusions of the Trial Examiner are incorrect conclusions of law, and there are no facts in the Record to warrant such conclusions of law.

XIX.

Respondent excepts to all of the recommendations of the Trial Examiner found on page 68, lines 3 through 24, and page 69, of the Report, and excepts to all of the Notice to all Employees shown as Appendix A attached to the Report, for the reason that they are not supported by the evidence.

XX.

Respondent excepts to the Erratum dated January 16, 1956 and filed with the Board by the Trial Examiner, wherein he recommends that Respondent "* * * and offer immediate and full reinstatement to him to his former or substantially equivalent position without prejudice to any

rights or privileges previously enjoyed by him," because same is not supported by the evidence or the law.

WHEREFORE, respondent prays that the above exceptions be sustained and that the intermediate report of the trial examiner be set aside and that the Board substitute

its own findings and conclusions to the effect that the Respondent is not guilty of any of the acts complained of and that these proceedings shall be in all things dismissed.

BETTER MONKEY GRIP COMPANY
Respondent.

By HERBERT S. BONNEY, JR.
Herbert S. Bonney, Jr.,
1133 Fidelity Union Life Building
Dallas, Texas.
Counsel for Respondent.

A copy of these exceptions have been served upon the following persons by registered mail: Mr. Harrison C. Thompson, Jr., Counsel for General Counsel, 300 West Vickery, Fort Worth, Texas; Mr. D. H. Woodall, Representative of Upholsterer's International Union of North America, AFL-CIO, 2118 Volga Street, Dallas, Texas.

D-9837
Dallas, Texas

DECISION AND ORDER

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts his findings, conclusions and recommendations with the modifications and exceptions noted below.

We agree with the Trial Examiner that the Respondent discharged Whaley because he gave testimony adverse to its interests in an earlier Board proceeding (Case No. 16-CA-742),[1] and not because of his asserted deficiencies as a super-

[1] We do not adopt the Trial Examiner's finding which indicates that Whaley was also discharged for his Union sympathies. Not only is this ground not urged as a reason for the discharge, but the record does not support such a finding.

visor, as the Respondent contends.[2] We find, as

did the Trial Examiner, that this conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organizational rights within the meaning of Section 8 (a) (1) of the Act. In our opinion, the net effect of Whaley's discharge was to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank

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[2] In finding that the Respondent's asserted reasons for Whaley's discharge were a pretext, the Trial Examiner, among other things, gave little weight to the oral testimony given by the Respondent because the best evidence was the written records which were not produced. Contrary to the Respondent's contention, the Trial Examiner did not mislead the Respondent into not producing these records. A reading of the entire colloquy between the Trial Examiner and counsel discloses that the records were not produced voluntarily and that the parties understood that the nonproduction of the records would affect the weight to be given to the oral testimony.

For the purpose of correcting and clarifying certain statements in the Intermediate Report, we note that Luther M. Everett, Jr., the Respondent's vice-president, testified that he called Whaley's attention to his errors in record keeping, but that he never threatened him with discharge for these errors. We also note that Whaley did not expressly deny spreading a rumor that the Respondent was ruining his health. However, when questioned under cross-examination whether he had admitted to Thomas Everett at the time he was reprimanded for circulating this rumor that he had said "some things like that," Whaley testified that he did not say "ruining my health — because I didn't say it that way." In addition, the Trial Examiner inadvertently failed to mention that Whaley denied that he circulated a rumor about the Union getting employees a raise, although the Trial Examiner stated that he believed Whaley and disbelieved employee Cribbs who testified to the rumor.

and file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act adverse to their employer. For these reasons, we find that Whaley's discharge violated Section 8 (a) (1) of the Act.[3] In view of this determination, and as the remedy, which we discuss below, would be the same, we find it unnecessary to consider whether the discharge also violated Section 8 (a) (4) of the Act.

The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8 (a) (1) of the Act, we shall order it to cease and desist from its unlawful conduct and take affirmative action necessary to effectuate the policies of the Act.

We have found, in agreement with the Trial Examiner, that Whaley's discharge interfered with, restrained and coerced nonsupervisory employees in the exercise of their statutory rights. Therefore, in order to restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act, we shall provide for

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[3] Cf. *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 215-217 (C. A. 5), enforcing 106 NLRB 295, 295-297; *N.L.R.B.* v. *Vail Mfg. Co.*, 158 F. 2d. 664, 666-667 (C. A. 7) enforcing 61 NLRB 181, 182-183, cert. denied 331 U. S. 835; *Inter-City Advertising Company*, 89 NLRB 1103, 1106-1108, enforcement denied on this point on other grounds, 190 F. 2d 420, 422 (C. A. 4).

Whaley's reinstatement with back pay, as prescribed in the Intermediate Report.[4] However, in accordance with the Board's customary policy, back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties.

We shall further enjoin the Respondent from in any other manner infringing upon its nonsupervisory employees' rights guaranteed in Section 7 of the Act. We find that such an order is necess ry to satisfy the remedial objectives of the Act because the Respondent's unfair labor practices reveal an attitude of opposition to the purposes of the Act.[5]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any

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[4] *N.L.R.B. v. Talladega Cotton Factory, Inc., supra; Inter-City Advertising Company, supra.*

[5] Cf. *N.L.R.B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 536 (C. A. 4).

witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order herein;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time-cards,

personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto as an appendix.* Copies of said notice to be furnished

by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, as to what steps it has taken to comply herewith.

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*In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Dated, Washington, D. C. April 30, 1956.

Boyd Leedom, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member
Philip Ray Rodgers, Member
Stephen S. Bean, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their right to self-organization, to form labor or-

ganizations, to join or assist UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order issued in this case.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

208

(Affidavit of Service Omitted)

209

(Return Receipts Omitted)

UNITED STATES OF AMERICA

Before the
NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

Case No. 16-CA-814

BETTER MONKEY GRIP COMPANY,
and
UPHOLSTERER'S INTERNATIONAL UNION
OF NORTH AMERICA, A. F. L.

BETTER MONKEY GRIP
COMPANY,
Respondent.

HERBERT S. BONNEY, JR.,
1133 Fidelity Union Life
Building,
Dallas, Texas,
Counsel for Respondent.

Warlick Law Printing Co. - 1207 Hord Street - Dallas - RI-6711

INDEX

	Page
I. Petition for Reconsideration	2
II. Motion for Remand	27

List of Authorities

Inter-City Advertising Company Case, 89 N. L. R. B. 1103	26
N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209 (C. A. 5)	23, 25
N. L. R. B. v. Vail Manufacturing Company, 158 F. 2d 664 (C. A. 7), cert. denied, 331 U. S. 835	19, 23

PETITION FOR RECONSIDERATION, AND, IN THE ALTERNATIVE, MOTION FOR REMAND

(Number and Title Omitted)

Now comes Better Monkey Grip Company, Respondent in this proceeding, and files herewith its Petition for Reconsideration, requesting that the Board vacate its Decision and Order and dismiss the complaint in its entirety; or, in

the alternative, by its Motion for Remand, that the Board remand the proceeding for the purpose of

taking evidence on the matter of whether Robert L. Whaley, whose discharge is the gravaman of the complaint herein, is physically able at this time to perform the duties which would be required of him if reinstated to his former position as ordered by the Board.

I. PETITION FOR RECONSIDERATION

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above entitled proceeding in which he found that the Respondent's action in terminating the employment of Robert L. Whaley, a supervisor, constituted a violation of Section 8 (a) (1) and 8 (a) (4) of the Act. In accordance with these conclusionary findings, the Trial Examiner recommended, *inter alia*, that the Respondent be ordered to offer to Whaley immediate and full reinstatement to his former or substantially equivalent position and to make him whole for any loss of pay he may have suffered as a result of Respondent's action in terminating his employment. On April 30, 1956, the Board, in its Decision and Order, adopted the Trial Examiner's finding that Whaley had been discharged because "he gave testimony adverse to (the Respondent's) interest in an earlier Board proceeding. (Case No. 16-CA-742)" and that such conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organiza-

tional rights within the meaning of Section 8 (a) (1) of the Act. The Board, however, did not find, as did the Trial Examiner, that the alleged conduct of the Respondent also constituted a violation of Section 8 (a) (4) of the Act.

214

3

The Respondent, by its petition herein, respectfully urges: (1) That the General Counsel has failed to prove a *prima facie* case; and (2) that the Trial Examiner's findings, as adopted by the Board, are not supported by substantial evidence on the record as a whole for the following reasons: (a) The evidence presented by the General Counsel in support of the charges set forth in the complaint does not sustain the Trial Examiner's inference that in terminating Whaley's employment the Respondent was motivated by illegal purposes, (b) that there is no evidence in the record that the discharge of Whaley from his supervisory position constituted, in any manner, interference with, restraint, or coercion with the self-organizational rights of the rank and file employees, and (c) that the record evidence does not support the Trial Examiner's factual conclusion that Whaley was discharged because he gave testimony adverse to the interests of the Respondent at a Board hearing. On the contrary, the Respondent urges that the weight of the evidence sustains its contention that Whaley's employment was terminated because his services were generally unsatisfactory to the Respondent. The Respondent, therefore, respectfully requests that the Board review the record evidence in this proceeding and, in accordance with

the arguments presented below, vacate its Decision and Order herein and dismiss the complaint in its entirety.

In its reconsideration of the record evidence, the Board is urged to take into consideration the fact that the record herein, upon which this case must be decided in its entirety, is completely devoid of any evidence, other than the one

215

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uncorroborated statement of Whaley that he overheard Jack Everett make a statement to Supervisor Talley that he would fire anyone who signed a union card, showing anti-union animus on the part of Respondent. Thus, it is highly significant *there is no evidence herein that:*

(1) Any statements or threats against union organizational efforts were made to the rank and file employees by any person allied with management;

(2) Management took any course of action to actively defeat the union organizational efforts;

(3) Any employee was discharged for engaging in union activities or that any employee was discriminated against for such activity;

(4) Any employee was told or led to believe that Whaley's services were terminated because he gave testimony at a Board hearing, or that, in fact, any statement

was ever made to anyone about Whaley's loss of employment and the reasons therefor.

The General Counsel, in his attempt to prove the allegations set forth in the complaint, called one and only one witness, namely Robert L. Whaley. Whaley's testimony, which constitutes the entire testimony offered in proof of the General Counsel's case, in Case No. 16-CA-814, if credited in its entirety, merely discloses the following:

(1) That Whaley was employed by the Respondent as a warehouse foreman; that his employment was terminated on February 18, 1955, for the reason, as expressed in a

letter to Mr. Whaley, that his employment was "presently unsatisfactory to management";

(2) That in or about March, 1954, while employed in a supervisory position, Whaley became interested in a labor union and became a member thereof;

(3) That in April, 1954, Whaley talked to Mr. L. M. Everett, Sr., who was president of the Respondent at the time, concerning his relationship with the union and that, according to Whaley's testimony, "he told me that he didn't know why we did want to go (union), but if we did he would be willing to go along with it"; that Whaley informed Mr. L. M. Everett, Sr., that he was in favor of the union;

(4) That Thomas Everett, the Respondent's president at the date of the hearing, told Whaley, in response to a statement by Whaley that he thought he would be fired for engaging in union activities, that nobody would be fired because they were in the union. This conversation developed during a conference between Thomas Everett and Whaley wherein Everett admonished Whaley for spreading false rumors that the Respondent was ruining his health and asked that Whaley stop making such statements. (Tr., pp. 36-37.)

(5) That Whaley overheard a conversation between Jack Everett, plant manager, and Garland Talley, another supervisory employee, in which Everett allegedly made a remark that "he would fire everyone that signed a union card if it took him ten years to do it and that he had a

good memory"; that approximately three days after overhearing this conversation, he heard Jack Everett make a remark that he knew three of the six leaders that started the union activities and that if he knew the other three he

would "let them go now";[1] and that Whaley testified in the proceedings before the Board that he heard such a remark.

(6) That on July 21, 1954, subsequent to his talk with Thomas Everett, wherein Thomas Everett told Whaley he wanted the untrue rumors Whaley was spreading to the effect that the Respondent was ruining his health stopped,

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[1]This is the testimony which the Trial Examiner finds was adverse to the interests of the Respondent and which served as the motivating factor in his discharge. It is significant to note that there is no evidence in the record of this case that any employee was discharged or threatened in any manner whatsoever because of his union activity; also, that although Whaley's union activities, which, of course, are completely unprotected under the Act, were fully known in March or April, 1954, Whaley's services were not terminated until almost a year thereafter. It is also highly significant that, notwithstanding the fact that Whaley's testimony that Jack Everett made such a statement is completely uncorroborated, the General Counsel did not attempt to show at the hearing through the direct testimony of Talley that this conversation between Jack Everett and Talley, which is vital to and the essence of the General Counsel's case, actually occurred. There is no evidence in the record that Talley's testimony was unavailable to the General Counsel. Perhaps the true reason why Talley was not called by the General Counsel as a witnes was that Talley testified at the prior hearing that he did not hear any such conversation.

The Respondent contends that the General Counsel not only had the burden of proving that Whaley made a statement adverse to the interests of the Respondent in a prior hearing before the Board, but that such testimony was in fact true. Otherwise, even if it be proven that such testimony, given under oath, were false, an employer would have no recourse against the employee regardless of how blatent the falsehoods might be. The Respondent, therefore, does not believe that proof of the mere fact that Whaley gave such testimony in a prior hearing is sufficient for the proof of a prima facie case in this proceeding, and that having failed to prove by a preponderance of the evidence that such prior testimony was true, the General Counsel has failed to sustain its burden of proof.

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Jack Everett addressed a letter to Whaley which read as follows:

> "It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.
>
> "These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.
>
> "We feel that these malicious statements are harmful to the company and employees to the extent that we must insist that they be stopped.
>
> "Any repetition of such actions will force us to request your resignation."

(7) That Whaley, an active union adherent, testified in answer to the question, "you were fighting management pretty much weren't you," "I don't think so, not too much."[2]

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[2]This sworn testimony must on its face be construed as an overt admission that Whaley was in fact fighting management officials — the only question was the extent of his fight or opposition to management.

(8) That on September 7, 1954, during the period between the first hearing before the Board in Case No. 16-CA-742, in July, 1954, and the second hearing in January, 1955, L. M. Everett, Sr., the Respondent's president, called Whaley in and attempted to find out whether the statement attributed to Jack Everett by Whaley that he would fire everyone who signed a union card was actually made; that L. M. Everett, Sr., did not believe such a statement had

been made; that Everett did not ask him to lie about the matter; that on the following day Mr. L. M. Everett, Sr., again called Whaley in so that Respondent's counsel could talk to him; that in the discussion that followed Respondent's counsel, in Whaley's own words, "kept on wanting me to tell him the *truth*" about the situation and inquired of him whether he wished to change his statement; that nothing else was said to him on the subject until the day before the hearing in January, 1955, when he was again asked by Respondent's counsel if he would consider changing his statement;[3] and that nothing more was ever said to him about the matter;

(9) That Luke Everett called to Whaley's attention errors in the reports which Whaley was responsible for keeping; that Luke Everett called his attention to these errors

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[3]The record shows that Everett had good cause, in view of the false rumors spread by Whaley, for doubting the truth of Whaley's testimony.

on more than one occasion; and that Whaley, in effect, admitted making such mistakes;[4]

(10) That after the termination of his services, Whaley, through his attorney, filed a suit claiming a "permanent

disability";[5] that, on occasion, in the performance of his

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[4]As indicated in the Intermediate Report (p. 53, lines 31-34), Whaley, in discharging his responsibilities as foreman of the Respondent's warehouse, had charge of receiving and accounting for over $1,200,000.00 in raw materials per year. Notwithstanding (1) Whaley's admission of making errors in his record keeping, (2) the uncontroverted testimony that the type of errors charged against Whaley were costly to Respondent, (3) and that the number of errors increased during the last two or three months of Whaley's employment, the Trial Examiner lightly passes over or minimizes the serious nature of these errors in record keeping which he merely refers to as "errors of computation — that is, in multiplication or addition." Suffice it to state that the reason Whaley was employed was for the express purpose of rendering correct and reliable records to the Respondent, and that records marked with "errors of computation" are neither correct nor reliable.

[5]At the hearing Whaley denied that his workmen's compensation suit claimed total disability. The official records, however, shows this to be an untrue statement, which Trial Examiner, despite its falseness, expressly finds, for some inexplicable reason, did not "impair" his "credibility as a witness."

duties, Whaley was required to handle heavy bales of rubber.*

As set forth in the Intermediate Report (p. 48, lines 1-37), the Respondent contends that Whaley's services were terminated for cause — that he had become an unsatisfactory employee because of his antagonistic attitude toward management, because he made mistakes and errors in the performance of his record keeping responsibilities, that he spread untrue rumors detrimental to management, and because he was apparently physically and mentally unable to handle his job. In conjunction with the evidentiary statements made by Whaley, it is recalled that Whaley was the *only witness* called by the General Counsel.

The Respondent respectfully contends that if the Board will re-examine the record evidence it will see, as the Respondent urged before the Trial Examiner and in its brief before the Board, that the General Counsel, through the uncorroborated testimony of its only witness Whaley, has

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*Notwithstanding his claim that he could physically perform his work at the time his services were terminated, Whaley stated in the petition (Tr., p. 35) filed in his suit for workmen's compensation (1) that he "had been unable to perform the normal task of a workman in his employment and has been unable to do any manual work or labor whatsoever"; (2) that he "has lost the use of his back, as a matter of fact, the ability to do any work whatsoever"; and (3) that he is unable to perform any kind or character of manual work to which he has been accustomed. In his Intermediate Report (p. 53, line 25 through p. 54, line 4), the Trial Examiner strangely concluded, on the basis of the "demeanor" of the witness, that "at the time of his discharge Whaley was ready, able and willing to perform his duties as described by the Everett brothers."

failed to prove a *prima facie* case that Whaley was discharged because he gave testimony adverse to the interests of the Respondent in a prior hearing before the Board. However, if the Board concludes that the testimony adduced by the General Counsel is sufficient to make out a *prima facie* case, then the Respondent contends that a review of the record testimony will reveal that the findings, conclusions and recommendations of the Trial Examiner are not supported by the preponderance of evidence on the record as a whole.

In defense of its conduct and the charges made against it, the Respondent, through its counsel, presented evidence at the hearing as follows:

1. Altha Lucille Cribbs, who has been employed by the Respondent for 8 years and who during such period of time has been acquainted with Whaley, testified that Whaley did not have a reputation for truth and honesty in the plant, but, rather, that he had a reputation for not telling the truth (Tr., p. 57); that Whaley made the statement, after a hearing before the National Labor Relations Board, to her and an Opal McElroy that "if the union hadn't helped any way, it had brought us a raise on the next pay check." (Tr. p. 56.)

2. Lila Belle Magee testified that a few days after Whaley's remark to Cribbs about the "raise," Cribbs told her about his statement. (Tr., p. 67.)

3. That, as indicated herein, under date of July 21, 1954, Jack Everett, having heard from some source about Whal-

ey's conduct and statements among the employees, found it necessary to write Whaley about his making untrue statements concerning the NLRB hearing to the effect that he (Whaley) had licked the company, that in his letter Everett informed Whaley that his malicious statements were harmful to both the company and the employees. (See I. R., p. 51, line 30 through p. 52, line 17.)[7]

(4) That Thomas Everett found it necessary to talk to Whaley in March or April, 1954, about the untrue, false rumors and statements Whaley was circulating in the plant prior to the election in the representation case; that during this conversation Whaley admitted, inferentially, spreading

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[7]Notwithstanding (1) Whaley's failure to expressly deny statements that he had circulated rumors through the plant; (2) the fact that he had been called into the office by Thomas Everett who admonished him for circulating false rumors; (3) that Jack Everett had on another occasion found it necessary to write him concerning rumors and statements that had come to his attention which had been spread in the plant by Whaley; (4) the testimony of Cribbs that he told her the union efforts had brought them a raise, which incidentally was never granted by Respondent; (5) the testimony of Magee that Cribbs had told her of Whaley's remark shortly after it was made, the Trial Examiner finds that the false rumors appear to be exaggerated and that the evidence in support of such rumors is shallow." In view of Whaley's failure to expressly deny or disavow the fact that he spread rumors detrimental to the Respondent among its employees, and his admission that to some undisclosed extent he was fighting management, an obvious breach of the allegiance owed by a supervisor to his employer, the Trial Examiner's conclusions are almost incredible.

tales and the matter of his back injury, which resulted from the fall of a bale of rubber from a fork lift.

(5) That according to the uncontradicted testimony of L. M. Everett, Jr., the Respondent's operational manager and purchasing agent who was one of Whaley's immediate supervisors, he called Whaley's attention to mistakes many times, and that the number of mistakes committed by

Whaley during the last two or three months of his employment increased to the extent of being a nuisance, and that these errors were one of the factors considered in discharging Whaley. (Tr., p. 118.)*

*With reference to the remark made by the Trial Examiner about the failure of the Respondent to put into evidence actual records showing the errors committed by Whaley (I. R., p. 50, lines 12-23), the Respondent strongly urges that if the Board will review the record evidence (Tr., pp. 106-107) it will discover that the narration set forth in the Intermediate Report by the Trial Examiner does not properly reflect the true facts. The record evidence discloses that while testimony was being elicited from Luther M. Everett, Jr., concerning the errors committed by Whaley, the General Counsel's representative objected to this line of questioning, contending that the records themselves were the best evidence of the errors and that such records should be introduced. Thereupon, after the Trial Examiner had overruled the objection to the testimony being given, counsel for the Respondent, although stating to the effect that the introduction of records themselves would prolong the hearing, offered to produce such records. At this point in the hearing the Trial Examiner replied, "No, I would assume that through the witness you could explain the nature more precisely in the record keeping." There is absolutely *no basis in the record evidence* for the Trial Examiner's statement (I. R., p. 50, lines 19-21) that the "Trial Examiner received the testimony with a statement to the effect that, *although the records might be the best evidence*, he would regard the verbal testimony of Luther

(Continued on Following Page)

6. That the decision to terminate Whaley's employment resulted from a conference between L. M. Everett, Sr., L. M. Everett, Jr., and Thomas Everett; that such decision was the "summation of several factors: (1) mistakes and errors made in the discharge of his responsibilities, (2) his overall attitude, (3) his disturbing and disruptive influence within the plant, (4) the fact that he was antagonistic

toward management to the extent he could not carry out his responsibilities as a supervisor, and (5) his physical inability to properly handle his duties. (Tr., pp. 86, 87.)

7. That Luther M. Everett's testimony corroborated the testimony given by Thomas Everett that the decision to terminate the employment of Whaley resulted from a conference in which they discussed: (1) his physical ineptness and general attitude, (2) the need for harmonious relations

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(Continued from Preceding Page)

M. Everett, Jr., according to the weight he thought should be accorded to it." (Emphasis added.) The record simply does not show that any such statement was made by the Trial Examiner and the Board's attention is respectfully directed to the transcript of the testimony given at the hearing. Moreover, there is no basis in the record evidence for the Board's finding (see footnote[2] of the Board's Decision and Order) that the "records were not produced voluntarily and that the parties understood that the nonproduction of the records would effect the weight to be given to the oral testimony." As indicated, counsel for the Respondent offered to produce such records. Respondent would show that such records for approximately the last year of Whaley's employment disclosed that during the last three months of his employment the incidence of his errors increased 230 per cent.

among the employees as a group, (3) Whaley's apparent inability to command the respect of his fellow employees, and (4) the fact that he actually "irritated the other employees in one way or another such as the false rumors and so forth." (Tr., pp. 111 to 113.)

Upon a reconsideration of all the evidence in this proceeding, the Board will readily see that the Trial Examiner was guilty of fallacious reasoning on several counts. The Trial Examiner in his Intermediate Report (I. R., p. 54, lines 30-32, and p. 55, lines 1-12) states that:

> "The history of Whaley as an employee of the Respondent and its predecessor corporation, and the sudden interest of the Respondent's officials in his ability to perform his work in a satisfactory manner after he openly expressed his favor for the Union, suggests only one conclusion: *He is discharged because of his known views concerning the Union and because he testified in a proceeding under the Act. The case against him for discharge for cause is too flimsy:* the testimony regarding his so-called inability to perform his duties, suddenly discovered about the time his interest in the union became known, and the accusations against him

> for spreading false rumors made after he had testified in July 1954, are too pat. The Trial Examiner so finds." (Emphasis added.)

With respect to these findings, the Respondent respectfully directs the Board's attention to the fact that there is no evidence disclosing that, as regards Whaley's work, there was any *"sudden interest* of the Respondent's officials in his ability to perform his work in a satisfactory manner after he openly expressed his favor for the union." The evidence merely discloses that his errors increased in frequency during the last two or three months of his employment to the point of becoming a "nuisance." The Trial Examiner found that this *sudden interest* suggested *"only one conclusion:* He was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act." (Emphasis added.) Although the Board did not adopt the finding that Whaley was discharged for his union sympathies, it is apparent from a reading of the Intermediate Report that this was the principal theory followed by the Trial Examiner in his entire approach to the case, and that, in all probability, such theory affected his credibility findings. The Trial Examiner's finding that Whaley was discharged because of his union views* overlooks a highly patent fact — a fact so obvious that it is incomprehensible that the Trial Examiner did not see it — that Whaley, as a supervisor, was not protected for his views and activities concerning the union organization-

al effort. Thus, *at any point of time* the Respondent had it

*The Trial Examiner, inasmuch as this theory is the first set forth in the Intermediate Report, apparently considered it the primary factor in Whaley's discharge.

so seen fit, could have discharged Whaley for such views and activities with impunity. When viewed in this context, the facts readily disclose that the Respondent's conduct was most tolerant, particularly when the fact is taken into consideration that Whaley, as a supervisor, was closely allied to management and to the proper fulfillment of its policies — a position quite incompatible, as recognized by the Act, with his union and rumor spreading activities. It is to be remembered that the Respondent's president talked with Whaley about the union activity in early 1954, and Whaley readily admitted that he was told if the employees wanted a union "he would be willing to go along with it." Yet, Whaley, who could have been discharged at this time because of his known union views, was not even reprimanded or reminded of the need of his loyalty to management. There is no evidence that Whaley ever suffered any single act of discrimination because of his union support prior to the date his employment was terminated, approximately a year later. Moreover, there is no evidence in the record of this case that any employee ever suffered a single act of discrimination because of union activity.

The Trial Examiner states that "the case against him for discharge for cause is too flimsy." "For cause" must carry some special connotation for the Trial Examiner, like dishonesty or some high crime or treason. Not only would Whaley's union activities, which must be construed an overt manifestation of his belief in principles inconsistent to some degree with his responsibilities and the loyalty

that an employer can demand of its supervisory personnel, have constituted sufficient reason, if there need be a reason, to discharge Whaley, but the record discloses that Whaley had further supplied the Respondent with other good reasons for resorting to the action taken. In view of the testimony indicating that one of the primary factors which caused the termination of Whaley's employment was his spreading of rumors detrimental to the interests of the Respondent, it is highly significant to note that Whaley did not at any time during the hearing, although given every opportunity to do so, deny spreading any rumors among the Respondent's employees.[10] In view of the record testimony, the Trial Examiner's statement that the "accusations against (Whaley) for spreading false rumors made after he had testified in July, 1954, are too pat" is unwarranted, and indeed strange, when read in conjunction with his previous statement (See I. R., p. 38, lines 20-26) which affirmatively shows that such conduct had started "early in the year 1954." It is true that, as indicated in the Intermediate Report (I. R., p. 51, line 30 through p. 52, line 17), Whaley received a letter dated July 21, 1954, about the time of the Board hearing of July 17-19, 1954, admonishing him for circulating false rumors, but, as indicated in the

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[10]The record testimony shows that on the occasion when Whaley and Thomas Everett discussed the matter of his circulating rumors about the Respondent maliciously ruining his health, Whaley merely denied that he said it "that way." (Tr., p. 28.) This statement coupled with his failure to expressly deny circulating any rumor lends credence to the record testimony that Whaley did in fact circulate rumors detrimental to the interests of the Respondent which had a disturbing and disruptive effect on the employees.

text of the letter, the rumors which prompted this letter were *different* from the rumors he had theretofore been charged with.

circulating — a new set of rumors. These rumors also appear to be different from the rumors witness Cribbs testified Whaley told her, i. e., to the effect, "if the union hadn't helped any way it had brought us a raise" (Tr., p. 56), which statement Cribbs at the time repeated to witness Magee, who so testified. The Trial Examiner also charges that Whaley's "so-called inability to perform his duties" was "suddenly discovered" about the time his interest in the union became known. There is no record evidence to support this conclusion. As pointed out, Whaley became a member of the union in early 1954 and his services were not terminated until almost a year later. The evidence shows that Whaley committed errors in the performance of his record-keeping duties, and that his prime responsibility as warehouse foreman was to keep proper and correct records of materials; moreover, according to the uncontradicted testimony of his supervisor, Luther Everett, Jr., these errors increased in frequency during the last two or three months of his employment to the point of becoming a nuisance. In addition, the record shows that Whaley sustained a back injury, which apparently aggravated a previously existing back condition, shortly before his employment was terminated. Notwithstanding the fact that evidence was introduced to show that if the statements set forth in the workmen's compensation suit filed at his behest were true,

Whaley could not, having suffered such alleged permanent injury prior to his discharge, adequately performed the lifting of heavy bales of rubber which he acknowledged he was required to do, the Trial Examiner, by

"demeanor" evidence, concluded that Whaley was "ready, willing and able" to perform his duties as a "supervisor." The only evidence in the record which could possibly serve as a basis for such finding was Whaley's uncorroborated, self-serving statement that he was able, as far as he knew, to do what he was supposed. Respondent contends that in view of the testimony regarding Whaley's inability to adequately perform his duties, and the evidence disclosing his workman's compensation claim alleging a permanent disability, the burden was upon the General Counsel to adduce evidence to affirmatively show that Whaley was physically able to perform his duties at the time his employment was terminated. As hereinafter set forth, following the hearing in the Board proceeding, Whaley recovered a very substantial sum of money as a result of his claim of permanent disablement, which serves as evidence of the fact that he suffered a substantial injury prior to the termination of his employment.

The Respondent respectfully requests that, in reconsidering the record evidence, the Board also consider the sworn testimony, which has just been made available to the Respondent, given by Whaley in the formal deposition taken in his workman's compensation case as to the extent and

duration of his physical injuries. As fully disclosed in the Motion for Remand, *infra*, Whaley's testimony discloses that at the time the deposition was taken, which was approximately eight months after the occurrence of the injuries, his physical condition would not permit him to perform the type of functions he had previously been required

to perform for the Respondent. In requesting that the Board consider such evidence at this time, the Respondent is guided by the reasoning of the Court in the *N. L. R. B. v. Vail Manufacturing Company* case, *158 F. 2d 664 (C. A. 7), cert. denied, 331 U. S. 835*, upon which the Board and Trial Examiner rely herein, to the effect that in determining whether the Act has been violated, a court must view all events, including the events happening subsequent to the alleged violation.

The Trial Examiner states that "the case against (Whaley) for discharge for cause is *too flimsy*." By way of recapitulation the Respondent earnestly points to the following record evidence:

(1) That Whaley joined the Union in early 1954, and that his union activities, which were unprotected under the Act, were known to the Respondent on or about such time;

(2) That all parties testifying on behalf of the Respondent actively associated Whaley with circulating untrue and unfounded rumors to the detriment of the Respondent; that,

as the Intermediate Report discloses, some of the rumors antedated his testimony at the Board hearing, that Whaley never expressly denied circulating any rumors;

(3) That Whaley's statement that he did not think he was "fighting management" "too much" is an admission that he was, in fact, fighting management, which fact the evidence bears out;

231

20

(4) That Whaley admitted making mistakes in the performance of his record-keeping functions, and that he did not deny that these errors increased during the last two or three months preceding his discharge;

(5) That Whaley suffered a back injury, or a recurrence of a previous injury, a few days prior to the termination of his employment, and that in the performance of his duties he was required, on occasion, to lift heavy bales of rubber.

The Respondent further submits that, in view of this record evidence, the only reasonable inference is that, as a union adherent, Whaley was malcontented, disgruntled, and displeased with Respondent's management and policies, and that his endeavors, as evidenced by the testimony, were allied with the union movement, rather than with the productive output of Respondent's plant. Under these circumstances, it is only reasonable to assume that, due to his dissident attitude, the accuracy of his record-keeping functions declined. Moreover, the evidence disclosing the back injury

suffered by Whaley shortly before the termination of his employment lends weight to the argument that he was not physically capable of performing his duties as the job requirements demanded. When all of the factors are considered together, it is readily apparent why the Respondent considered Whaley an unsatisfactory employee for the highly responsible position he held.

The Trial Examiner, however, in glossing over these evidentiary facts, places great emphasis on the fact that the termination of Whaley's services followed shortly after he

gave testimony at a Board hearing. The Trial Examiner's reasoning in this respect presupposes certain facts and is, on its face, illogical and fallacious. As stated, Whaley's union activities commenced approximately a year before his services were terminated, and such activities were known to the Respondent. At this time, if the Respondent had so chosen, in order to curb the union movement, it could have discharged Whaley with impunity. Thereafter, the Respondent could have discharged Whaley before the Board hearing for spreading false rumors had it so desired.

The Respondent respectfully submits that if it had wished to discharge Whaley for giving testimony adverse to its interests, the logical time to have done so would have been after his testimony at the July, 1955, hearing. Unless the power of clairvoyance can be attributed to the Respondent, it would have had no occasion upon the conclusion of this

hearing to presuppose that the case would be remanded and that Whaley would again be called to testify. If it is argued that the Respondent could foresee the Board's remand, then had it been motivated by a desire not to have Whaley testify, it could, by discharging him at that time, possibly have defeated any attempt by the General Counsel to call him at a later date — there is the strong possibility that this course of action would have made his later whereabouts unknown, or placed him beyond the powers of a subpoena call. It is quite obvious that to keep him employed only insured that he would be available for any purpose that the General Counsel deemed necessary. An-

233

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other significant fact is that none of the Respondent's officials said anything to Whaley about his testimony after the hearing. In fact, nothing was said to him until September 9th and 10th when he talked with L. M. Everett, Sr., and Respondent's counsel concerning his prior testimony. It is apparent from Whaley's testimony that he was *never threatened* with loss of employment if he refused to change his testimony. Whaley readily admitted that he was not asked to tell a falsehood, and the record testimony discloses that at all times the Respondent's president and counsel were apparently trying only to elicit from him the truth concerning the alleged statement that constituted the basis for Whaley's adverse testimony. In view of the false rumors that Whaley had been spreading, the action taken by the Respondent appears entirely plausible and reasonable, particularly when it is considered that the party, Talley, to

whom the statement that employees who joined the Union would be fired was allegedly made — it being remembered that Whaley only claimed to have overheard such statement — testified in Case No. 16-CA-742 (See Tr., p. 342) that such statement was not in fact made. L. M. Everett, Sr.'s statement, or admonishment, to Whaley at the time to the effect that if it was proved Whaley was lying, his services wouldn't be needed any more, appears to demonstrate that Everett was in fact searching for the truth. There is no record evidence to indicate to the contrary. It would seem at this point that, inasmuch as the Respondent's president and counsel had full knowledge that Whaley would not change his prior testimony and that his continued employment could only be injurious to them

in this respect, the only logical course of action would have been to discharge him at that time. However, this action was not taken. Whaley's testimony shows that nothing else was said to him about the matter until the day before the hearing in January, 1955, when the Respondent's counsel merely asked if he would consider changing his prior statement. This is all that was ever said about the matter. In view of these facts, the record testimony to the effect that Whaley's employment was purposely not terminated until after the last Board hearing is entirely logical — certainly there is no plausible reason why the Respondent would have retained his services otherwise.

The Trial Examiner, as authority for his finding that the Respondent's conduct violated Section 8 (a) (1), and 8 (a) (4) of the Act, cites the following cases: *N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209 (C. A. 5); N. L. R. B. v. Vail Manufacturing Co.*, supra. A review of these cases discloses that the factual situations involved therein are clearly distinguishable from the case at hand. In both of the cited cases there was record evidence disclosing that the respondents therein had engaged in conduct which demonstrated a very strong anti-union animus, and that such respondents had committed numerous violations of Section 8 (a) (1) and 8 (a) (3) of the Act; whereas, in the case at hand, with the exception of Whaley's uncorroborated statement, the record is completely devoid of *any evidence* showing anti-union animus or activity on the part of the Respondent. In the *Talladega Cotton* case, there was evidence (1) of unlawful interrogation, (2) of threats

against the employees for their union activity, (3) of the discriminatory demotion of one employee, (4) of discriminatory discharge in violation of Section 8 (a) (3) of the Act, and (5) that supervisory employees were discharged for refusing to engage in unfair labor practices on the part of the employer. The Board, under this rampant pattern of anti-union animus and discriminatory conduct stated in its decision as follows:

> "In these circumstances, where, as here, the discharges followed immediately on the heels of the

> Union's victory in the Board-conducted election, the discharges plainly demonstrated to rank and file employees that this action was part of its plan to thwart their self-organizational activities and evidenced a fixed determination not to be frustrated in its efforts by any half-hearted or perfunctory obedience from its supervisors. In our opinion, *the net effect of this conduct was to cause non-supervisory employees reasonably to fear that the Respondent would take similar action against them* if they continued to support the Union. For this reason, we find that the discharges violated Section 8 (a) (1) of the Act."

Thus, the Board in finding that Section 8 (a) (1) of the Act had been violated used what might be termed the "net effect" test, with the Board expressly stating that the "net effect of this conduct was to cause non-supervisory employees *reasonably to fear* that the Respondent would take similar action against them if they continued to support the Union." (Emphasis added.) The Board concluded that "*For this reason,* we find that the discharges violated Section 8 (a) (1) of the Act. It is apparent from a reading of the Court's decision that, in enforcing the Board's rem-

edial order, the Court was following the rationale utilized by the Board. Inasmuch as the record in this case is completely devoid of any evidence indicating that the Respondent engaged in any type of conduct proscribed by the Act

insofar as the rank and file employees are concerned — in fact, with the exception of Whaley's uncorroborated statement to the contrary, *there is not a scintilla of evidentiary matter* which discloses opposition to any union organizational activities. Moreover, *there is no evidence in this case* that any statement was made to anyone regarding Whaley's discharge to indicate, or from which an inference could reasonably be drawn, that the termination of Whaley's employment had any connection whatsoever with his testimony given at a Board hearing. The Respondent respectfully urges that when the facts are viewed in this light, it is apparent that, under the Board's "net effect" test, the General Counsel has failed to prove a *prima facie* case.

A review of the facts in the *Vail Manufacturing Co.* case, upon which the Trial Examiner also relies, discloses that, as in the *Talladega Cotton Factory* case, there were widespread violations of Section 8 (a) (1) and 8 (a) (3) of the Act. The evidence in the *Vail* case disclosed that, in addition to the discharge of supervisory employees, the respondent therein *inter alia*, (1) engaged in interrogation of the rank and file employees, (2) threatened to "close the

doors" in the event of unionization, and (3) actually discharged 23 employees — all union members. The Court in the *Vail* case expressly took cognizance of the "active and energetic anti-union campaign" and emphasized the fact that the "Respondent's whole course of conduct was intended to thwart or destroy union activities at its plant." A study

of the *Inter-City Advertising Company* case, *89 NLRB 1103*, also relied upon by the Board and the Trial Examiner, discloses that (1) employees were threatened with loss of employment; (2) that employees were interrogated concerning their union membership and activities; (3) that the employer threatened to close down its station to prevent unionization; (4) that the employer spied on the activities of the employees; (5) that the employer discharged employees; (6) that the employer demoted an employee, and (7) that the employer refused to bargain in violation of Section 8 (a) (5) of the Act.

In reviewing the cases cited by the Trial Examiner, it is apparent that the facts upon which both the Board and the courts relied are inapposite to the facts of the case at hand, because there is no evidence that the Respondent herein attempted to thwart the union activities in any manner whatsoever. In fact, there is no evidence that any employee even associated the termination of Whaley's employment with the fact that he gave adverse testimony at a Board hearing.

Under the foregoing circumstances, the Respondent submits that the General Counsel has failed to prove a *prima facie* case herein that Whaley's employment was terminated because he gave testimony adverse to the interests of the Respondent at a Board hearing. The Respondent further submits that if the Board is of the opinion that the General Counsel has, on the record in this case, proved a *prima facie*

case, the findings, conclusions, and recommendations of the Trial Examiner are not supported by the substantial evidence on the record as a whole. The Respondent, therefore, respectfully requests that the Board reconsider its Decision and Order, and that, upon the basis of the record testimony, it vacate such Decision and Order and dismiss the complaint herein in its entirety.

II. MOTION FOR REMAND

As discussed herein, the evidence discloses that Whaley suffered a back injury shortly before the termination of his employment. The record shows that on June 2, 1955, Whaley filed suit in a state court seeking a recovery on his back injury. In his petition in such suit Whaley alleged, *inter alia*, (1) that he "had been unable to perform the normal tasks of a workman in his employment and had been unable to do any manual work or labor whatsoever"; (2) that he "has lost the use of his back, as a matter of fact, the ability to do any work whatsoever"; and (3) that he is unable to perform any kind or character of manual

work to which he has been accustomed (Tr., pp. 34-35). Notwithstanding this record evidence, and the fact that Whaley was required, on occasion, to lift heavy bales of rubber, the Trial Examiner, by "demeanor" evidence, concluded (see I. R., p. 30-33, p. 53, and p. 54, lines 1-4) that at the time Whaley's services were terminated he was ready, willing, and able" to perform his duties as a supervisor.

The Respondent would respectfully show the Board that on November 7, 1955, a judgment was entered in the 14th Judicial District Court of Dallas County, Texas, which awarded Whaley the amount of $2,602.50 in settlement of his suit alleging permanent disability suffered while in the employment of Respondent. The Respondent notes for the Board's enlightenment that the amount of recovery had by Whaley represents, or is equal to, under the Texas Workman's Compensation Law which allows $25.00 a week for each week of disability, the amount an employee would be entitled to receive for approximately 104 weeks of disablement. The Respondent would also show the Board that in the formal deposition taken on September 16, 1955, in that case, which was approximately eight months after the termination of his employment, Whaley testified under oath as follows:

> (1) That in the interim period between the termination of his employment by the Respondent and the date he was employed in the position he held at the time his deposition was taken, he applied for unem-

> ployment compensation, and at that time he informed the Texas Employment Commission, "I was for light work. I asked for light work. I couldn't do heavy work."[11]

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[11]See Exhibit A, which is a photostatic copy of page 6 of Whaley's deposition.

(2) That Whaley suffered a neck injury in 1953 for which he recovered, after attorney fees, approximately $1,600 (total amount paid in settlement of Whaley's claim for injuries in this matter amounted to approximately $2,400.00).[12]

(3) That as a result of the injury suffered by Whaley in this case, he walks stooped over and that "since this last injury I couldn't straighten up on account of the injury across my kidneys, that I had this last time." "In fact, I couldn't lay on my stomach at all now, after this last injury."[13]

(4) That Whaley suffered two other back injuries while in the Respondent's employ, such injuries occurring approximately five and seven years ago.[14]

(5) That, in answer to the question, "When did they fire you?", Whaley testified "Because I was getting crippled and wasn't able to do as much as they wanted me to, to start with."[15]

(6) That in describing how his injuries occurred, Whaley testified as follows:

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[12]See Exhibit B, which is a photostatic copy of page 10 of Whaley's deposition.

[13]See Exhibit C, which is a photostatic copy of page 11 of Whaley's deposition.

[14]See Exhibit D, which is a photostatic copy of page 13 of Whaley's deposition.

[15]See Exhibit E, which is a photostatic copy of page 11 of Whaley's deposition.

"I was straightening up some skids with a fork truck and there was — has a metal bottom in it and when that gets damp or wet or something, it gets real

slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped over against the sides — it has got ribs up and down it, you know, and it caught me right in the center of my back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions."[18]

(7). That in describing the extent of his injuries, Whaley testified as follows:

"Well, the right arm — I can't hardly use it —

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[18]See Exhibit F, which consists of page 17 of the deposition, which is also marked Exhibit E, and page 18.

raise it up — can't hardly pick up anything with it to amount to anything, on account of too much pain there to raise it up. And I can't lay down on my back at all — I mean on my stomach at all, and very little on my back on account of the pain across my kidneys — when I lay down on my back it kind of tends to straighten my back out to where it is hurt there and the pain is severe. I can't hardly sleep long at a time; I have to change positions about every hour and a half during the night. I don't get much rest as it is; I lay there and I have got to move and turn over."

(8) That, although it appears that the duties of the job Whaley was holding at the time his deposition was taken were less strenuous than the duties he was required to perform for the Respondent, it was necessary that his wife come out to the job so that "(Whaley) can make a day out there."

242

31

Thus, it is apparent from Whaley's sworn testimony[17]

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[17]The Board may also wish to consider whether or not the sworn testimony set forth in Whaley's deposition discredits the testimony given by Whaley, which was likewise given under oath, at the Board hearing. There arises one indisputable fact: *the only witness called by the General Counsel to offer testimony in support of the allegations set forth in the complaint, gave different testimony on the same subject matter on two occasions while under oath to tell the truth and only but the truth.* This indisputable fact must lend weight — particularly in light of the Court's reasoning in the *Vail Manufacturing Co.* case, *supra*, that a court must also view the events happening subsequent to the alleged unlawful conduct which is the gravamen of a Board complaint — to the argument that the General Counsel has failed to prove a *prima facie* case herein.

that he suffered extensive physical injuries which rendered him incapable of performing the functions he was required to perform, and which he would be again required to perform if reinstated to his former position. In fact, it is also apparent, in view of the other injuries to Whaley's neck and/or back, that any attempt to perform the daily lifting of heavy objects might only serve to cause additional injury to an already aggravated back condition; and that, if such is not now the case, such action might only serve to fully incapacitate Whaley and render him a complete cripple. Moreover, it is quite possible that, in the attempt to perform such functions, Whaley might, from dropping, etc., cause damage to the property of the Respondent or others, or, more important, might cause serious physical injury to some guest or invitee on the Respondent's premises or to some other employee for which the Respondent would, of course, be liable.

In view of the foregoing, the Respondent respectfully requests that the Board, in the event it denies the Respondent's Petition for Reconsideration, remand this proceeding

for the purpose of taking testimony on the question of whether or not Whaley is in fact physically capable of performing the functions of the job to which it has been ordered that he be reinstated, and whether or not, on the

basis of competent medical advice, such action is to be recommended or even sanctioned.

Respectfully submitted,

BETTER MONKEY GRIP COMPANY,
Respondent.

By HERBERT S. BONNEY, JR.
HERBERT S. BONNEY, JR.,
1133 Fidelity Union Life Building,
Dallas, Texas,
Counsel for Respondent.

A copy of this Petition for Reconsideration and Motion for Remand has been served upon the following persons by registered mail: Mr. Harrison C. Thompson, Jr., Counsel for General Counsel, 300 West Vickery, Fort Worth, Texas; Mr. D. H. Woodall, Representative of Upholsterer's International Union of North America, AFL-CIO, 2118 Volga Street, Dallas, Texas.

A Yes, sir.

Q Did you have to tell them you were ready to go to work?

A Yes, sir.

Q Did you have to tell them ou were willing to go to work?

A Yes, sir.

Q Did you have to tell them you were able to go to work?

A I was for light work; I asked for light work. I couldn't do heavy work.

Q Did you get full benefits for unemployment during that five weeks?

A Yes, sir.

Q Have you ever applied for unemployment benefits at any other time?

A Well, it has been a long time.

Q How long ago?

A First, twenty-second, 1940, I believe.

Q 1940?

A I think that is what it reads.

Q Whereabouts do you live, Mr. Whaley?

A At Arlington.

Q Where, in Arlington?

A 815 Scott Drive.

Q How long have you been living there?

I got hit, you know, it popped my head backward and forward and made me stiff-necked.

Q Did you claim you were permanently disabled?

A No, sir.

Q What?

A No, sir.

Q Well, what did you claim?

A Well, just that I wasn't able to do the work that I used to do because it was too painful for me and I couldn't rest at night.

Q Did you get any money on account of that suit?

A Yes.

Q How much?

A Well, to my part I got Sixteen Hundred.

Q Did you work while that suit was pending?

A Yes, sir.

Q You worked right along?

A Yes, sir.

Q Regular work?

A Yes, sir.

Q And your part was Sixteen Hundred, is that right?

A That is what I netted, yes, sir.

Q Well, didn't you claim you were permanently disabled in that lawsuit?

A Not that I remember of.

Q I notice when you walk, you sort of walk stooped over?

A Yes, sir.

Q How long have you been walking like that?

A Well, since this last injury I can't straighten up on account of the injury across my kidneys, that I had this last time.

Q Well, you walked stooped over after that other accident, didn't you?

A Very little; it was mostly because of my neck.

Q Well, you walked stooped over and said you couldn't walk standing up, didn't you, in that other lawsuit?

A Well, no, not like I do now.

Q Well, what is the difference?

A Well, there is quite a bit of difference. I just can't — just bent over more than I ever was. In fact, I can't lay on my stomach at all now, after this last injury.

Q And it is your testimony that the only thing you were complaining of at that time is your neck?

A Yes, sir.

Q Is that right?

A So far as I know, it is.

Q Well, you know where you were hurt, don't you?

A Well, it was right at the base of my neck, is where it was.

Q Is that the only place where you had pain?

A Yes, the x-ray man.

Q How did you happen to go to those doctors?

A I was sent there by Mr. Harless.

Q Are you satisfied with the treatment they gave you?

A Yes, sir.

Q You thought they were pretty good doctors?

A I think so.

Q Well, have you had any other injuries of any kind?

A Only those other two back injuries that I got out at the plant. They had — there was a report on that where I went up to Altick up there.

Q When was that?

A I believe one of them was about five years ago and the other about seven.

Q Did you lose any work?

A No, sir.

Q Your back has just been bothering you for years, hasn't it?

A Only when I got hurt out yonder — the only time it has bothered me to amount to anything.

Q Well, when were these other two back injuries?

A They were out at the Monkey Grip.

Q When?

A Along about five years ago and the other about seven, just about, approximately — I don't know for sure.

don't know which, but they didn't give me any reason.

Q When did they fire you?

A Because I was getting crippled and wasn't able to do as much as they wanted me to do, to start with.

Q When did they fire you?

A I don't remember the date exactly.

Q Well, was it just before you went over there for these employment benefits?

A Yes, sir.

Q You worked about a week after you claim you got hurt?

A No, a little bit longer than that, two or three weeks — two weeks, I think.

Q How did you get hurt?

A I was straightening up some skids with a fork truck and there was — has a metal bottom in it and when that gets damp or wet or something, it gets real slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped ove against the sides — it has got ribs up and down it, you know, and it caught me right in the center of my

back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions.

Q Didn't you usually use a fork truck out there in your work?

A Well, I had used it for three or four years and then they got a man to drive it altogether. Well, they decided to move him to another job and they were going to put another boy on it; they moved him on to another job Wednesday and they were going to put another boy on it on Monday; so I had to have some work done with it, so I used it myself then.

Q All you were doing was stacking these skids?

A Stacking skids, yes, sir.

Q Did somebody tell you to do that?

A No, sir, I was my own boss out there. I do everything that I see that needs to be done, I do it.

Q What was your job out there?

A Receiving clerk.

Q You say you fell into a bin?

A Yes.

Q And it was next to a loading dock?

A Yes.

Q And you fell down into the bin from the fork lift?

250

ORDER

(Number and Title Omitted)

On April 30, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on July 23, 1956, the Respondent filed a petition for reconsideration of the said Decision and Order, and, in the alternative, a motion for remand. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said petition for reconsideration be, and it hereby is, denied on the ground that nothing has been advanced that was not previously considered by the Board; and

IT IS FURTHER ORDERED that the alternative motion for remand be, and it hereby is, denied as it relates to a question of compliance and is therefore premature at this time.

Dated, Washington, D. C., Aug. 10, 1956.

By direction of the Board:

Frank M. Kleiler

Executive Secretary

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[1] 115 NLRB No. 186

251

(Affidavit of Service Omitted)

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252

(Return Receipts Omitted)

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No. 4061 LIBRARY SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
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UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

U. S. COURT OF APPEALS
FILED
NOV 5 1956
John A. Fechan, Jr.
CLERK

INDEX

Page

Witnesses (For General Counsel):

Robert L. Whaley

Direct Examination 8

Cross Examination 18

Redirect Examination 28

Witnesses (For Respondent):

Altha Lucille Cribbs

Direct Examination 34

Cross Examination 36

Redirect Examination 42

Recross Examination 43

Lila Belle Magee

Direct Examination 44

Robert L. Whaley

Direct Examination 46

Thomas H. Everett

Direct Examination 52

Cross Examination 61

Redirect Examination 68

INDEX — Continued

Page

Luther M. Everett, Jr.

Direct Examination 69

Cross Examination 79

Respondent's Exhibit A 87

Respondent's Exhibit B 88

Respondent's Exhibit C 89

Respondent's Exhibit D 90

Respondent's Exhibit E 91

Respondent's Exhibit F 92

General Counsel's Exhibit No. 2 93

General Counsel's Exhibit No. 3 95

Respondent's Exhibit No. 1 97

JOINT APPENDIX

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BETTER MONKEY GRIP COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE THE NATIONAL LABOR RELATIONS BOARD
Sixteenth Region

In the Matter of

BETTER MONKEY GRIP COMPANY
and Case No. 16-CA-814
UPHOLSTERERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL

Room 614C,
1114 Commerce Street
Dallas, Texas,
Tuesday, November 8, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a. m.

BEFORE:
ARTHUR E. REYMAN, Trial Examiner.

APPEARANCES:

HERBERT S. BONNEY, JR., Esq., 1133 Fidelity Union Life Building, Dallas, Texas, appearing on behalf of the Respondent.

HARRISON C. THOMPSON, JR., Esq., Room 2093, 300 West Vickery, Fort Worth, Texas, appearing on behalf of the General Counsel.

* * * *

3

PROCEEDINGS

TRIAL EXAMINER REYMAN:
We'll open the record, gentlemen.

This is a formal hearing before the National Labor Relations Board.

I was designated last Friday as Trial Examiner — my name is Arthur E. Reyman — to hear consolidated cases No. 16-CA-742 and No. 16-CA-814. Before this hearing was opened this morning, Mr. Thompson, counsel for the General Counsel, called my attention to order withdrawing the complaint and notice of hearing in Case No. 16-CA-742.

Now, I understood from a very short discussion I had with the associate Trial Examiner in Washington over the telephone, that the consolidated cases involved first a remand by the Board for a hearing de novo in one case and the other case was a new one to be heard de novo, too, of course.

Now, which is which?

MR. THOMPSON:
Mr. Examiner, by way of explanation —

TRIAL EXAMINER:
16-CA-742, I see, has been withdrawn, that is, there is an order withdrawing the complaint and notice of hearing in that case.

MR. THOMPSON:

That is correct. That is the case that was remanded for a hearing de novo. 16-CA-814 is the case that was to be heard initially for the first time in this proceeding.

* * * *

MR. THOMPSON:

I would like to ask the reporter to mark for identification the following papers which comprise the

formal exhibits in the case: As General Counsel's Exhibit 1-A, charge filed in Case No. 16-CA-814, filed February 21, 1955, signed by D. H. Woodall in behalf of the union;

* * * *

As General Counsel's Exhibit 1-E, respondent's answer in Case 16-CA-814, dated October 18, 1955;

As General Counsel's Exhibit 1-F, an order withdrawing the complaint and notice of hearing in Case No. CA-742, dated November 4, 1955, signed by Edwin A. Elliott, Regional Director;

* * * *

MR. THOMPSON:

With the preliminary matters, yes, sir, except for one thing, with respect to Paragraph 4 of the complaint, dealing with the charging union as being a labor organization, the Examiner's attention is directed to Case 16-RC-1447 involving the Better Monkey Grip Company, respondents here, and the Upholsterers' International Union, which was the petitioner in that case and is the charging union in this case.

TRIAL EXAMINER:

I take it the Board certified the union in that case?

MR. THOMPSON:

No, sir, they did not. This is merely the decision and direction of election to which I am referring, wherein the Board determined that this union was a labor organization.

TRIAL EXAMINER:

Was that a reported case?

MR. THOMPSON:

No, sir, but I have extra copies of the decision and direction of the election. It was not a reported case, I don't believe.

TRIAL EXAMINER:

What was the date of the decision?

6

MR. THOMPSON:
June 3, 1954. An election was held.

* * * *

8

MR. BONNEY:
We want to file a motion, dictate it, to dismiss this proceedings on the following grounds and with respect to the following parts of the complaint, to-wit:

(1) To all of the complaint, because the complaint under Case No. 16-CA-814 was, by an order which is in the record, consolidated with Case No. 16-CA-742 and they became one case and that case was ordered withdrawn by order of the Regional Director, and we believe that perhaps technically the whole case is thereby withdrawn.

(2) To the entire complaint because it is not alleged that Whaley is an employee of the company as defined in the Act.

(3) To Paragraph 8 of the complaint because neither the complaint nor Paragraph 8 alleges that Robert L. Whaley is an

9

employee or was an employee of respondent and because it relies upon Section 8 (a), Subsection (4) of the Act, which only applies to the employees as defined in the Act.

Wherefore respondent prays that the complaint be dismissed as set out in this motion. Better Monkey Grip Company, by Herbert S. Bonney, Jr., Attorney.

* * * * *

12

MR. THOMPSON:
Will you stipulate with me that Mr. Whaley was a supervisor within the meaning of the Act?

MR. BONNEY:
Yes, sir.

MR. THOMPSON:
All right, General Counsel and counsel for the respondent hereby stipulate that the person named in the complaint as Robert L. Whaley was employed by the Better Monkey Grip Company as a supervisor within the meaning of the Act.

TRIAL EXAMINER:
That's agreeable?

MR. BONNEY:
We agree.

* * * *

ROBERT L. WHALEY,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Thompson) . . .

* * * *

Q Are you the same Mr. Whaley named in the charge in this case?

A Yes, sir.

Q Have you ever been employed by the Better Monkey Grip Company?

A Yes, sir.

Q About when did you go to work for them, Mr. Whaley?

A About 1939.

Q When did you cease working for them, Mr. Whaley?

A In 1955.

Q What was your job with the company, Mr. Whaley?

A I was receiving clerk and warehouse foreman.

Q While employed by the Better Monkey Grip Company, did you become interested or associated with a labor union?

A Yes, sir.

Q About when was that?

A It was in, sometime in March, I believe.

Q What year?

A '54.

Q I direct your attention to sometime during the month of April 1954, Mr. Whaley. Did you talk to any company officials concerning your relationship with the union in the month of April '54?

A Mr. Everett, I believe.

Q Which Mr. Everett?

A Mr. L. M., Sr.

Q Who is Mr. L. M. Everett, Sr.?

A He's president of the company.

Q What did you say to Mr. Everett, if anything, concerning the union?

A Well, at that time, why, he was — he came out to the warehouse where I was and wanted to know what I thought about the union, and stuff like that. We discussed it out there, and he told me that he didn't know why we did want to go that way, but if we did he would be willing to go along with it. He didn't know why, he couldn't figure out why that we all wanted to do that.

Q Did you tell him you were in favor of the union?

A Yes, sir.

Q All right, sir; I direct your attention now to the month of July 1954, specifically on or about the 17th of July 1954. Did

you testify in a hearing involving the Better Monkey Grip Company on that date?

A Yes, sir.
Q Were you subpoenaed?
A Yes, sir.
Q By whom were you subpoenaed?
A Mr. Thompson.
Q Is that me?
A Yes, sir.
Q All right. I direct your attention again or now to the month of January 1955, specifically on or about January 28, 1955. Did you testify in a hearing involving the Better Monkey Grip Company on that date?
A Yes, sir.
Q Were you subpoenaed?
A Yes, sir.
Q By whom?
A Mr. Thompson.
Q That's me?
A Yes, sir.

* * * *

Q (By Mr. Thompson) All right, in view of the ruling of the Examiner and further in view of the doubt he has expressed, I think I will ask you, Mr. Whaley, a few more questions about such testimony to be sure that they are included in this record. Mr. Whaley, I direct your attention to the month of April 1954. Before I ask you a question concerning the month of April, I would like to have you tell me where in the plant you worked.

A Mainly it was on the dock and in the warehouse.
Q Did you have an office?
A Yes, sir.
Q Did you share the office with anyone during the month of April 1954?
A Yes, sir.
Q With whom?
A Garland Talley.
Q Who was Mr. Talley?
A He was a foreman at the plant.
Q During the month of April, did you hear Mr. Talley or anyone else connected with the company make any comments concerning the union?
A Yes, sir.
Q Where were you when you heard such comments?
A I was in the office.
Q Who else was present?
A Jack Everett, Garland Talley and myself.
Q Who is Jack Everett?
A He's — at that time he was plant manager.

TRIAL EXAMINER:
Let me get this straight. One Mr. Everett has been mentioned as president.

MR. THOMPSON:
Four of them.

MR. BONNEY:
There are four of them, Mr. Examiner.

TRIAL EXAMINER:
This is another one, Jack Everett?

21

MR. THOMPSON:
Yes, sir.

TRIAL EXAMINER:
All right; sorry.

Q (By Mr. Thompson) What did you hear said?

A I heard Jack say to Garland that he would fire everyone that signed a union card if it took him ten years to do it, and he had a good memory.

Q Did you hear any further conversations?

MR. BONNEY:
We want to object to this evidence and all like it —

A Yes, sir.

MR. BONNEY:
Can it be understood for the record that all these questions are objected to by the respondent?

TRIAL EXAMINER:
I will grant you a continuing objection and exception.

Q (By Mr. Thompson) Did you hear any further conversation?

A Yes, sir.

Q How long after the first one did you hear another conversation?

A About two or three days later.

Q Where did that take place?

A In the same office.
Q Who was present?
A Jack, Garland and myself.
Q What was said?
A He said he knew there was six of them leaders that started

this union and he knew of three of them and if he knew the other three, why, he would let them go now.
Q Who was doing the talking?
A Jack was doing the talking.
Q All right. Now, I direct your attention to the period between the first hearing in July 1954, and the second hearing in January 1955. During that period, Mr. Whaley, did any representative of the company say anything to you about the testimony you had given?
A That would be the time that they called me in the office.
Q Just tell us what happened and when it happened. First answer my question; did any representative of the company say anything to you?
A Yes, sir.
Q About when did it take place?
A About the 7th, 8th and 9th of September.
Q Was that 1954?
A Yes, sir.
Q Who, Mr. Whaley?
A The first day it was Mr. Everett.
Q Which Mr. Everett?
A Senior.
Q All right. Tell us what happened.

A He wanted to know if I would withdraw my statement in saying that I had decided that Jack said what he did in a

joking manner or that he didn't mean what he had said.

Q What did you say, if anything?

A I told him that I couldn't do it because I thought it would be lying if I made that kind of a statement and it was the truth the way I heard it, that is, I heard it direct, you know, and it was, I actually heard it and if I went back on my word, why, I felt like that I would be lying, I would rather not do it.

Q I see. That was on the 7th of September?

A Seventh, yes, sir.

Q And you also mentioned, the 8th. What happened on the 8th?

A I was called back into the office and Mr. Everett told me that Mr. Bonney wanted to talk to me and on that he wanted Mr. Bonney to talk to me about what we had talked about the day before.

Q Did you talk to Mr. Bonney about that?

A Yes, sir.

Q What did you tell Mr. Bonney, if anything?

A Well, he kept on wanting me to tell him the truth about the situation and he wanted to know if I wouldn't change my statement and that they would draw up a plan for me to sign that if I didn't think Jack said that in a joking manner or did I — that I had decided that he didn't mean what he had said.

Q What did you say, if anything?

24

A I still refused to do it because I thought I would be lying against the statement that I had already made and that I knew it was so because I had heard him say it myself, and I wouldn't go back on the testimony because I didn't think it was right to be.

Q What happened on the 9th of September, Mr. Whaley?

A Well, they had given me until the next day to make up my mind whether or not I wanted to go through that procedure and sign those, sign this withdrawal statement, and I again refused to do it.

Q All right. After the 9th of September was anything else ever said to you again about your testimony until this hearing in January 1955?

A There was the day before the hearing.

Q January '55?

A Yes, sir.

Q Where did that occur?

A That occurred in Jack's office.

Q Who talked to you then?

A Mr. Bonney.

Q What did he say to you at that time?

A He wanted to know if I was still — had my mind made up to go through with it like I said I would and wanted to know if I would consider changing my statement, and which I wouldn't do it.

25

Q Did you testify at the hearing in January?

A Yes, sir.

Q All right. After the hearing in January 1955, until

the time your employment was terminated, did any company official say anything further to you about your testimony or anything else concerning the hearings?

A No, sir.

Q All right. I'd like to show you a letter, Mr. Whaley.

MR. THOMPSON:

I would like to have the reporter mark for identification as General Counsel's Exhibit 2 a letter dated February 18, 1955, on the letterhead of the Better Monkey Grip Company, addressed to Mr. R. L. Whaley, signed by Mr. L. M. Everett.

• • • •

Q (By Mr. Thompson) Would you look at that, please, Mr. Whaley. Would you tell us what that is, please, Mr. Whaley.

A That's a letter that I got telling me that I was being terminated as of the date of this letter.

Q I see. How was that letter delivered to you?

A It was delivered to me by letter. It was in an envelope and it was given to me.

Q Who gave it to you?

A Garland.

• • • •

Q (By Mr. Thompson) Before you received this letter, Mr. Whaley, had you been notified that you were to be terminated?

A No, sir.

Q Had there been any complaints made about your work or anything else?

A Yes, sir.

Q When did that happen?

A Not my work, but about what I had talked about going through the plant, I think I got a letter to that effect, too.

Q When was that letter, do you remember?

A I don't remember the exact date.

Q All right. I show you a letter about that.

MR. THOMPSON:

I would like to have this marked for

identification as General Counsel's Exhibit 3.

* * * *

Q (By Mr. Thompson) This is a letter dated July 21, 1954, addressed to Mr. Robert Whaley, signed by Jack Everett. I would like to have you tell us, Mr. Whaley, if that's the letter to which you are referring?

A Yes, sir.

Q All right. Other than that letter and the notice of termination, did you receive any other warning of any

nature from the company from the date of this letter until the time you were discharged?

A No, sir.

TRIAL EXAMINER:

Mr. Whaley, did I understand you to say that you had joined the Upholsterers' Union?

THE WITNESS:

I just signed an authorization card.

26

TRIAL EXAMINER:

And that was in 1954?

THE WITNESS:

I think so.

CROSS EXAMINATION

Q (By Mr. Bonney) Mr. Whaley, you say that you were only warned once and that was by this letter dated July 21 warning you to quit circulating rumors through the plant, is that correct?

A Yes, sir.

Q Now, prior to that, didn't Mr. Tommy Everett, the vice president of the company who is sitting right here,

call you in his office and talk to you about some other things that were unsatisfactory to Monkey Grip?

A That was prior to the hearing, wasn't it?

Q Yes, sir. Is that true, he did call you in and talk to you?

A Yes, sir, he called me in and talked to me in the office.

Q Didn't he at that time complain of your circulating rumors around that Monkey Grip was ruining your health maliciously?

A Yes, sir.

Q Didn't you admit to him that you had said some things like that?

A Not ruining my health, I didn't, because I didn't say it that way.

TRIAL EXAMINER:

Because what?

THE WITNESS:

Because I didn't say it that way.

Q (By Mr. Bonney) But he did tell you that he wanted you to quit circulating those kind of rumors, didn't he?

A He said I would get in serious trouble if I gave false rumors like that over the plant that wasn't so.

* * * * *

Q Mr. Whaley, you said that Mr. Everett talked to you right after you had testified in the first hearing and tried to get you to change your testimony?

A Yes, sir.

Q Did Mr. Everett try to get you to tell — Did he tell you to tell a lie or anything?

A No, sir, he didn't ask me to tell a lie.

Q Did he disbelieve your testimony and try to get you to admit it, that it was not true?

* * * *

30

A The way I understood it, he said he didn't think it would be telling a story to make that kind of a statement and if I did, why, that would be the end of the trial, the end of the trial, the end of all it, you know, there wouldn't be anything else done about it if I would do that.

* * * *

TRIAL EXAMINER:

What did he say to you, as nearly as you can remember?

THE WITNESS:

Well, he wanted me to, you know, they wanted to —

TRIAL EXAMINER:

No; just give us his words as nearly as you can, his exact words as nearly as you remember.

THE WITNESS:

Well, he said if — he wanted me to change those — say that Jack didn't mean what he had said or that he said in a joking manner and there would be a form written up

for me to sign, you know, to that effect, and that that would be the end of the hearing and close the case, everything would be over and there wouldn't be any more said about it.

* * * *

Q (By Mr. Bonney) Didn't he tell you that you were mistaken about that, that that wasn't even said?

A Well, he said he had two against my one that it wasn't said and —

Q So he didn't believe it, did he?

A Sir?

Q He did not believe it, did he?

A He didn't believe it was said.

Q No, and he was trying to get you to admit that you didn't say it, wasn't he?

A May I have that question again?

Q He was trying to get you to admit that it really wasn't said, wasn't he?

A Well, I don't know exactly whether he did or not but —

Q All right, now, then when I talked to you the next day I tried to get you to admit that it wasn't even said, didn't I?

A You said you figured I just imagined that I heard it, you said that I had a great imagination and I imagined I heard it when I really didn't hear it, and I told you that I did because I was there in the office and I heard it direct, I heard Jack tell Garland that.

Q All right, that's enough of that. Now, did anybody threaten to fire you if you didn't change that statement?

A Well, nothing only where he said he had two against my one, if he could prove me out a liar he wouldn't need my services any more.

Q Who said that?

A Mr. Everett.

Q You didn't testify to that in the other hearing, did you?

A Well, no, sir, I didn't.

Q You just thought of that, didn't you?

A No, sir.

Q You are pretty mad at the Everetts, aren't you?

A No, sir.

Q Did you care if they fired you? Did it make you mad when they fired you?

A No, sir, because I figured there was a misunderstanding there.

Q As a matter of fact, you weren't able to work anyhow, were you?

A At that time I was.

MR. THOMPSON:

I object to the question.

Q (By Mr. Bonney) You were able to work?

A I was working.

Q Were you able to do that work?

A As far as I know I was, what I was supposed to do.

Q Weren't you going around the plant complaining about your health and them ruining your health?

A No, sir. I said I spent the best part of my life there.

Q You said that you could actually do that work then?

A At that time, yes, sir.

Q Did you have to handle heavy bales of rubber?

A I didn't have to at that time.

Q Did you do it?

A Part of the time, when I couldn't get the help that I asked for.

Q Well, right after you quit, didn't you go to a lawyer and file a suit against the Workmen's Compensation Company for total and permanent disability?

MR. THOMPSON:

I object to the question; wholly immaterial to this proceeding.

MR. BONNEY:

It isn't immaterial, Mr. Examiner, because it's for the purpose of impeaching this witness. He has testified that he could do the work and we want to show that he couldn't, and impeach him.

TRIAL EXAMINER:

I'll permit the question.

34

Q (By Mr. Bonney) Didn't you file such a suit claiming total and permanent disability?

A Not total, no, sir.

MR. BONNEY:

We wish to offer in evidence at this time Exhibit 1 for respondent, I'll have to furnish another copy.

MR. THOMPSON:

Can you have two made, Mr. Bonney, one for me?

MR. BONNEY:

Yes, I will. This is a petition in the District Court in a suit filed by Mr. Whaley against the Traders and General Insurance Company, which is a suit for total and permanent disability, filed on the — I'll have to read the filed date on it.

MR. THOMPSON:

Second day of June 1955. General Counsel objects to the receipt of this document. It is wholly and absolutely immaterial to this proceeding, introducing in this proceeding a collateral issue involving a proceeding in a State Court, wholly and completely irrelevant and immaterial to this proceeding.

35

MR. BONNEY:

It's introduced for the purpose of impeaching the witness.

TRIAL EXAMINER:

Well, there's one allegation here in Paragraph 3 of this complaint to the effect that plaintiff, meaning Mr. Whaley, after February 21, '55, "had been unable to perform the normal task of a workman in his employment and has been unable to do any manual work or labor whatsoever."

Paragraph 7 of the said complaint relates the nature of his injuries and concludes, "As a result, plaintiff has lost the use of his back, as a matter of fact, the ability to do any work whatsoever."

In Paragraph 8 he refers to his inability to do or perform any kind or character of manual work to which he has been accustomed, and in Paragraph 9 he says that if he should be mistaken in that he is not totally and permanently disabled then he alleges that he is disabled to the extent of at least 75 per cent.

I don't know. I'll overrule the objection and receive Respondent's Exhibit 1 over that objection for whatever it's worth.

* * * *

MR. BONNEY:

We offer the exhibit to impeach the witness' testimony.

TRIAL EXAMINER:

Yes, I understand that it is directed to the credibility of the witness, and that's the reason I am receiving it.

Q (By Mr. Bonney) Now, Mr. Whaley, I believe you said that you did not claim that you were totally and permanently disabled in your suit, is that right?

A I don't know exactly how the lawyers put it in there, because I didn't — I didn't see any of the reports on it or anything that they put in and I didn't sign any kind of a report of any kind.

Q You authorized them to file the suit, did you?

A Just authorized them to file the suit where I was hurt and how I was hurt.

Q They were authorized to file that petition for you there, were they not?

A Yes, sir.

Q Now, then, getting back to this meeting that Mr. Tommy Everett had with you, where in he told you that he wanted these rumors stopped regarding ruining your health, that was prior to the first hearing, wasn't it?

A I believe it was. I am not sure.

Q And at that time, that same time, didn't you tell him that you thought you were going to get fired any time because you were engaged in union activities?

A I told him that according to what Jack said that I would be.

Q And didn't he tell you at that time that nobody would ever be fired because they were in the union?

A Yes, sir, that's what he told me.

Q And don't you know, as a matter of fact, that at the

time you left there that there were a lot of employees that were in the union that were still there?

A Yes, sir.

Q And you know that the Everetts knew they were in the union, don't you?

A Part of them I do, yes, sir.

Q And they are still there, aren't they?

A Part of them, yes, sir.

Q Now, isn't it true that you also tried to circulate a rumor right after the first hearing that the union had lost the election, but they had won a pay raise because in a few days everybody was going to get a raise?

A No, sir, I didn't say that.

Q You didn't say that at all?

A No, sir.

Q Well, you could have said it and forgot it, couldn't you?

A I don't think so.

Q You were fighting management pretty much, weren't you?

A I don't think so, not too much.

Q Well, could you lift those heavy bales of rubber just before you quit?

A Well, I had to whether I felt like it or not.

Q Did you fall down and injure yourself just before that, just before you were discharged?

A Yes, sir.

Q Did you hurt your back when you did that?

A Yes, sir.

Q Was that an old back injury that you reinjured?
A No, sir.

• • • • •

39

REDIRECT EXAMINATION

Q (By Mr. Thompson) Mr. Whaley, was Tom Everett your boss out there at the plant, actually?
A No, sir.
Q When he talked to you last year, that you testified about, do you remember what his job was at that time?
A He was sales manager.
Q Who was your boss?
A I suppose Jack Everett was.
Q He was in the production end of the business, is that right?
A Yes, sir.
Q Did Jack ever say anything to you directly concerning any alleged rumors?
A No, sir. Jack and I didn't have any conversation together.
Q Just had the conversation with Tommy that time, is that right?
A Yes, sir, I just had the conversation with Tommy.
Q Did you say anything to Tommy at the time you talked to him concerning the things you had overheard between Jack and Garland?

A Yes, sir, I told him that — when he told me about the rumors going through the plant that wasn't so, I told him I knew there was one of them so because I had heard it myself.

* * * *

TRIAL EXAMINER:

Yes; I will let him answer.

Do you remember the question, Mr. Whaley?

THE WITNESS:

Yes, sir, and I told him that I knew that one of the rumors was so because I heard Jack say it in his own words, heard it direct from Jack talking to Garland, and that was on the comment that he would fire everybody that signed the union card if it would take him ten years to do it, and he had a good memory.

Q (By Mr. Thompson) Did anybody else connected with the company other than Tom Everett and the things about which you have testified and the letter you received, which is in evidence, ever say anything to you about anything connected with rumors or anything else like that?

A No, sir.

Q Did any official of the company ever intimate to you that they felt you couldn't do your work properly?

A No, sir.

41

Q In connection with the document that has been introduced in evidence as Respondent's Exhibit 1, the petition filed in your behalf in the State Court, did you ever actually read that over, Mr. Whaley, before it was filed by your attorneys, this document right here, Respondent's Exhibit 1, this petition filed in the Workmen's Compensation case?

A No, sir, I haven't seen anything.

Q I see. So this petition was filed by your attorneys?

A Yes, sir.

Q And you didn't see it before it was filed?

A I haven't seen anything, no, sir.

MR. THOMPSON:

I point out to the Examiner, that it's signed only by someone purporting to be Fred Harless, attorney for plaintiff.

TRIAL EXAMINER:

Is it a verified petition?

MR. THOMPSON:

No, sir, it's not that I can see. It's not a verified petition.

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43

TRIAL EXAMINER:

Just to satisfy my curiosity, if nothing else, who is Mr. Everett, Mr. L. M. Everett, Sr.?

MR. THOMPSON:

L. M. Everett, Sr., was formerly the president of the Monkey Grip —

MR. BONNEY:

Chairman of the Board.

MR. THOMPSON:

And chairman of the board and now does not actively participate in the business at all. . . .

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MR. THOMPSON:

General Counsel does not intend to call further witnesses, but before he rests he would like to direct

the Examiner's attention to certain dates and ask that he take judicial notice of these dates because it is felt that the dates are significant in determining the merits of this case. First, the date of the original hearing, July 17 and 19, 1954, in Case 16-CA-742. The date that the original Intermediate Report was issued in that case, in 16-CA-742, which was August 27, 1954, IR 518. Next the date of the respondent's motion to remand, which was September 18, 1954. Next the date of the remand hearing, January 27 and 28, 1955.

TRIAL EXAMINER:

Will you explain to me, please, what the remand hearing — there was a hearing after remand before Mr. Whittemore?

MR. THOMPSON:
Two hearings before Mr. Whittemore.

TRIAL EXAMINER:
You said the remand hearing.

MR. THOMPSON:
The first remand hearing, then, I'll put it that way. There was a remanded hearing before Mr. Whittemore on respondent's motion to adduce additional testimony held on January 27-28, 1955. Last the date of the supplemental Intermediate Report in that case. That's IR 639, which is February 9, 1955.

TRIAL EXAMINER:
What was that date?

MR. THOMPSON:
February 9, 1955.

TRIAL EXAMINER:
The hearing on remand was January 27 and Intermediate Report February 9.

MR. THOMPSON:
That's right. I requested you take judicial

notice of those dates and at the proper time argument will be made by counsel for General Counsel concerning the significance thereof.

TRIAL EXAMINER:

I suppose they are all a matter of record.

MR. THOMPSON:

I think they are, yes, sir.

TRIAL EXAMINER:

Very well.

* * * *

MR. BONNEY:

At this time respondent would like to renew the motion filed herein at the beginning of this proceedings, and in connection therewith would like to say that it is stipulated and beyond any dispute that Whaley is or was at the time he was discharged a supervisor and not an employee and therefore that the testimony does not show in any respect that any violation has been committed by Better Monkey Grip Company under Section 8 (a) (4), since that section applies only to employees as defined in the Act, which specifically excludes supervisors, that is, the definition specifically excludes them, and the wording of Subsection (4) uses the word employee, the same word which is defined in the Act; for the further reason that there is no evidence in the record of any kind that under Section 8 (a) (1) that any other employees who were actually employees as defined in the Act were deprived of their rights to organize or do the other things that are guaranteed in that subsection. There is no evidence that even there was any effort to organize. There is no evidence that there is any mention or any endeavor

46

or any thought even of organizing at the time of Mr. Whaley's discharge, and so we think that the Upholsterers' International, the complainant, has wholly failed to make a prima facie case.

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55

ALTHA LUCILLE CRIBBS,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bonney) . . .

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Q Where do you work?
A At Better Monkey Grip.
Q How long have you been employed there?
A Eight years this past June.
Q Do you know Robert L. Whaley?
A Yes, sir.

• • • •

Q (By Mr. Bonney) Were you employed there the first part of September 1954?
A Yes, sir.

Q Did you overhear a conversation between Mr. Whaley and someone else about that time?

56

A Yes, sir.

Q State whether or not that conversation was made before or after a hearing before the National Labor Relations Board. Was it made before or after that hearing, or do you know?

A I think it was after.

Q Will you state what you heard Robert Whaley say at that time?

A He said if the union hadn't helped any way it had brought us a raise, we would get a raise on the next pay check.

Q Who did he tell that to?

A Another girl and myself.

Q Was she employed there in the plant, too, the other girl?

A She was then.

Q What was her name?

A Opal McElroy.

Q Did the raise that he was talking about materialize?

A No, sir.

Q Did you tell anyone or any of your superiors in the plant about that conversation at a later date?

A Yes, sir.

Q Was Mr. Whaley employed there at the time you related that conversation to management?

A Yes, sir.

Q Did you believe what Mr. Whaley was saying when he said it?

MR. THOMPSON:

I object; it calls for an opinion.

57

MR. BONNEY:

The purpose of that testimony is to attack the credibility of Mr. Whaley. I want to get into another line of testimony now.

TRIAL EXAMINER:

I'll permit

Q (By Mr. Bonney) Did you believe what he said when he said it?

A No, sir.

Q Why didn't you believe what he said?

A I didn't think we would.

Q Did Mr. Whaley have a reputation for truth and honesty in the plant?

A No, sir.

Q Did he have a reputation for not telling the truth?

A Yes, sir.

Q Is that the reason you didn't believe it?

A Yes, sir.

MR. BONNEY:

Your witness.

CROSS EXAMINATION

Q (By Mr. Thompson) How long did you say you had known Mr. Whaley, Miss Cribbs?

A The length of time I had worked at the plant.

Q How long was that?
A I worked there eight years this past June.
Q Where did you work in the plant, Miss Cribbs?
A In the packing department.

58

Q How well did you know Mr. Whaley?
A As an employee I knew him there at the plant.
Q How many times a day did you see him working there?
A Well, I wouldn't know about that; several times.

* * * * *

Q Now, when did you say this conversation took place where you overheard Mr. Whaley say something about a raise? When did it take place?
A In the late summer.
Q Late summer?
A Yes, sir.
Q What year was that?
A In '54.
Q How far were you from Mr. Whaley when you heard this said?
A We were just standing talking like this man was Mr. Whaley.
Q I see. Were you talking to Mr. Whaley yourself?
A Yes, I was talking in the conversation.
Q What time of day was it?
A I don't remember.
Q Somebody else was there at the same time, I believe you said?

A Yes, sir.

Q Was it in the packing department where it took place?

A No, sir, it was in the warehouse, inventory.

Q Exactly what did he say, Miss Cribbs?

A He said if the union hadn't helped in any way it would bring us a raise.

Q Did you tell him you didn't believe that?

A Yes, sir.

Q Were you at that time in favor of the union, Miss Cribbs?

A Yes, sir.

Q Have you ever been in favor of the union?

A No, sir.

Q Were you strongly opposed to the union?

A Yes, sir.

Q Did you know that Mr. Whaley was in favor of the union?

A I thought so.

Q But you weren't in favor of it?

A No, sir.

Q Did you consider that you were friendly with Mr. Whaley while he was working out there?

A I tried to be.

Q Do you know where Mr. Whaley lives?

A Well, I don't know the address. I knew he lived at Arlington.

Q Did you ever happen to visit Mr. Whaley out in Arlington?

A No.

Q So the only connection you ever had with Mr. Whaley was

right there at the plant, is that right?

A That's right.

Q Did you hear anybody else say anything about a raise or anything like that because of this union?

A No, sir, not that I recall.

Q You didn't hear anybody else except Whaley, is that correct?

A No name that I can think of.

Q Well, do you remember ever hearing anybody else say it, whether you remember their name or not?

A Nothing only the one, the girl that was out there with me, we were talking about it.

Q I asked you the question did you ever hear anybody else say anything about the union getting the employees a raise?

A No.

Q The answer was no?

A I think I understand you that it would be no. I don't know whether I do or not.

Q Let's get it perfectly clear now, I am not trying to confuse you. I will ask you over again. Did you ever hear anyone at the plant besides Whaley make any reference to the union getting the employees a raise?

A No, sir.

Q You are sure of that? Are you sure of that?

A Yes, sir.

Q Isn't it a fact, Miss Cribbs, that there for a while dur-

ing this organizing campaign it was pretty common talk that

61

one of the things the union was going to try to do was get the employees a raise?

A I didn't talk to very many of them.

Q Well, answer my question, please. Isn't it a fact that during this organizing campaign in the spring of 1954 and on through there and July, that it was pretty common talk around the plant that one of the things the union was going to try to do was to get the employees a raise?

A Well, I'll say yes, sir.

Q Then you had heard somebody else talk about raises besides Whaley?

A Not no name that I know of.

* * * *

63

Q (By Mr. Thompson) Other than the conversation concerning the raise you heard Whaley talk about, on what do you base your opinion that Mr. Whaley's reputation at the plant for telling the truth was not good?

A I don't understand.

TRIAL EXAMINER:

Well, now, you testified that Mr. Whaley's reputation for truthfulness at the plant, so far as you knew, was not good. Mr. Thompson is simply asking you in small words why do

you say that. What your reason for that belief, what do you base your statement on?

THE WITNESS:

Well, the only thing I could base it on was that I just didn't believe that what he was telling.

TRIAL EXAMINER:

We are talking about reputation, which is something else. Reputation is what other people in the immediate vicinity, the neighborhood — now we are talking about the plant.

THE WITNESS:

They wouldn't believe him.

TRIAL EXAMINER:

Why do you say that?

Q (By Mr. Thompson) Why?

TRIAL EXAMINER:

Not why they wouldn't believe him, but why do you say they wouldn't believe him?

MR. BONNEY:

May I suggest that it be asked why she knows they wouldn't believe him?

MR. THOMPSON:

I would like an answer to my question upon what she bases her opinion, if I can get it.

MR. BONNEY:

She doesn't understand the question, I don't believe.

TRIAL EXAMINER:

I don't know.

Q (By Mr. Thompson) It's been phrased three or four times. I will try it once more. Miss Cribbs, listen carefully to what I am asking you. I am merely asking you on what do you base your statement that Whaley's reputation for telling the truth was bad. What is the basis for your statement? You said it was bad, what's the basis for your saying that it was bad?

(No response.)

MR. THOMPSON:

Apparently I am not going to get an answer to this question, Mr. Examiner.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Bonney) Miss Cribbs, at the time you heard Mr. Whaley say that there was going to be a raise that the union had gotten for the employees, did he say when that raise would be effective?

A In the next pay check.

Q Did he state that as a direct statement of fact or did he qualify it with a maybe or just what did he say with respect to it?

A He said it direct, that he thought that it would be, the way I understood it.

65

Q Have you ever heard anybody else in the plant state over the period of years you have known Mr. Whaley that they didn't believe him?

A Yes, sir.

Q Over how long a period have you been hearing that, that people didn't believe him?

A A year or two.

Q Have you heard more than one person say that?

A Yes, sir.

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RECROSS EXAMINATION

Q (By Mr. Thompson) You said you had heard more than one person say that they didn't think Whaley told the truth. How many more than one, Miss Cribbs?

A I couldn't tell you.

Q Was it more than one?

A Yes, sir.

Q Was it more than two?

A I wouldn't tell you any number at all, because I don't know.

Q All right. Who has told you that they didn't think Whaley had a good reputation for telling the truth?

Answer, please.

A I don't know.
Q You don't know?
A No, sir.

* * * *

LILA BELLE MAGEE,
a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bonney) Will you state your name?
A Lila Belle Magee.
Q Where are you employed?
A Better Monkey Grip.
Q How long have you been employed there?
A Five years last June.
Q Do you know Miss Cribbs, who just testified?
A Yes, sir.
Q Do you know Mr. Whaley?
A Yes, sir.
Q I'll ask you if you heard Miss Cribbs' testimony just a moment ago.

A Yes, sir.
Q Did you hear what she said with respect to a conversation that Mr. Whaley had with her when he told her that the union had gotten the plant a raise and that it would

be effective on the next pay check, did you hear her testify to that a moment ago?

A Yes, sir.

Q I'll ask you whether or not, then, before today you have ever heard of that conversation? Have you heard of that conversation before right now today?

A What, about that?

Q Yes.

A Yes, sir.

Q Well, will you tell the court exactly when you heard that, approximately.

A Well, it was — wasn't but a few days after he told it that she came and told me about it.

Q What did she tell you about it?

A She told me what Bob had said about the raise.

Q Did she state when it was supposed to be effective?

A Yes, on the next pay day.

MR. THOMPSON:

I object to this line of testimony. It is completely and absolutely hearsay with respect to the issues of this case, it's immaterial.

MR. BONNEY:

The purpose of the testimony is to show that

Miss Cribbs heard this and told someone else about it before today, it's not an after thought, it's corroborative of the other testimony.

MR. THOMPSON:

I still object to it. It is hearsay and immaterial, Mr. Examiner. I can't see it has any bearing upon this particular question at all. It's testifying as to something the witness told her, not something she herself heard.

MR. BONNEY:

We are not trying to prove the truth of it; we are trying to prove that she did tell her and that's the only purpose.

TRIAL EXAMINER:

Yes, I think to that extent it's all right. I will permit the answer to stand.

74

ROBERT L. WHALEY,

a witness called by and on behalf of the Respondent, being previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bonney) . . .

Q Now, Mr. Whaley, I believe you testified this morning that you had a conference with Mr. L. M. Everett, the president of the company at that time, in which he talked to you

about changing your testimony in the hearing that you testified in, is that right?

A Yes, sir.

Q Did I understand you correctly when you told me on cross examination that at that time Mr. Everett, L. M. Everett, told you that if you didn't change your testimony, that you would lose your job?

75

A No, sir.

Q You didn't say that?

A Not according to the testimony, no, sir.

Q Well, he did not tell you that, then, is that right?

A The only way he told me was that he had two against my one and if he could make me out a liar, why, he wouldn't need my services any more.

Q Well, did he tell you at that time that he wanted you to tell the truth?

A Yes, sir, but I didn't feel like I was telling the truth if I made the statement that he wanted me to make.

Q Well, he did tell you in so many words that he wanted you to tell the truth, didn't he?

A Yes, sir, he wanted the truth.

Q And so he thought that you weren't telling the truth, didn't he?

A Well, I don't know about that, whether he did or not.

Q Well, he told you to tell the truth, didn't he?

A Yes, sir, he told me to tell the truth.

76

Q Now, Mr. Whaley, you received a written letter that's already in evidence warning you about circulating false rumors, didn't you, in July 1954?

A Yes, sir.

MR. BONNEY:

May we have that. I want to reintroduce that as our exhibit also. It can be understood that it is in evidence for respondent?

TRIAL EXAMINER:

Well, the record will show that respondent's 1 has been received and that, I think, is General Counsel's 3, the letter of July 21, 1954.

MR. BONNEY:

Yes, sir.

Q (By Mr. Bonney) Now, you say that, you said this morning that that was the only warning that you ever got from Monkey Grip management, is that right?

A Yes, sir.

77

Q Well, as a matter of fact, when Tommy Everett talked to you prior to that didn't he give you a warning also verbally?

A Only just that if I didn't stop those rumors that was going around, if I didn't quit telling those rumors around through the plant, that wasn't true that I would get in serious trouble.

Q Well, wasn't that a warning?

A Well, it wasn't prior to that, the letter, though, the hearing.

TRIAL EXAMINER:

It was not?

THE WITNESS:

So far as I know, I am not for sure, but I am pretty sure it wasn't.

Q (By Mr. Bonney) When was that warning given?

A I am not for sure.

Q Now, it's true, isn't it, that you did some work for Mr. Luke Everett, didn't you, kept some records that he had supervision of?

A I just out the receiving reports and turned them in to him.

Q It's true, isn't it, that from time to time you made some errors in those records, isn't it?

A Well, naturally you'll make some.

Q It's true, isn't it, that Mr. Luke Everett called those errors to your attention and asked you to be more careful, didn't he?

A Well, he didn't ask me to be more careful.

Q He called them to your attention, though, didn't he?

A He called them to my attention, yes, some of the errors that I made.

Q More than one time, didn't he?

A Yes, sir, it's more than one time.

Q And not too long before your discharge, was it, that he called them to your attention?

A I don't know for sure.

Q What kind of records were those? What did they have on them? What kind of information?

A Unless I made a mistake in addition of the material that came in is the only thing I know, something like that which anybody could.

Q What kind of information did you have on the records? Was it a list of materials that came into the plant from the railroad station, purchases of the plant, or what was it? Tell us what it was.

A Well, I don't know exactly specifically what the different items was; there were so many different items that come in there that I can't remember all of them, but I filled them out to the best of my knowledge, which anybody else would do.

TRIAL EXAMINER:

That's not the question, Mr. Whaley. The question is what did the records show, what were they supposed to show, a list of materials received, list of materials that went out? What did the records show?

THE WITNESS:

Well, I just had to turn in an itemized statement of what came in and the goods that came in is what I had to show.

Q (By Mr. Bonney) The number of —

A Where it was from and the amount that was in the shipment.

Q And a description of what kind of materials it was?

A Yes, a description.

Q And those are the records you made mistakes on?

A Well, some few, naturally anybody would do that.

Q You didn't take it too seriously when you made a mistake?

A Well, I tried to correct it, you know, to the best of my knowledge, and watched the next orders that came through to try to get it as near right as possible.

Q You don't attach much importance to your making those mistakes, then?

A Oh, yes, it should be as near as correct as it possibly can be and which I tried to make it as near correct as I possibly could.

Q Did you have to do any multiplication to make out those reports?

A Oh, yes.

Q Did you make mistakes in multiplication?

A In some of it, I guess I did.

Q Did you have to do addition?

A Yes, sir.

80

Q Did you make mistakes in addition?

A It's possible.

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THOMAS H. EVERETT,

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bonney) . . .

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Q Where do you work?
A At Better Monkey Grip Company.
Q In what capacity?
A President.
Q How long have you been president of Better Monkey Grip Company?
A Since April 1, 1955.
Q Who did you succeed as president?
A L. M. Everett, Sr.

81

Q What relation is he of yours?
A He is my father.
Q Do you have any other relatives that are officials in the business?
A Yes.
Q Name them and give their capacities.
A Well, there's John R. Everett, who is vice president in charge of production, there's L. M. Everett, Jr., who is vice president, secretary and treasurer.
Q L. M. Everett, Jr. —

TRIAL EXAMINER:
Let me get the Everetts straightened out. L. M. Everett, Sr. is?

THE WITNESS:
He is now chairman of the board.

TRIAL EXAMINER:
He's your predecessor?

THE WITNESS:
Yes. He was president prior to me.

TRIAL EXAMINER:
And Mr. Luke Everett?

THE WITNESS:
Yes, that's L. M. Everett, Jr. He is vice president, secretary and treasurer, operational manager, purchasing agent.

TRIAL EXAMINER:
And Mr. Jack Everett is a plant manager?

THE WITNESS:
Yes, that's right.

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Q (By Mr. Bonney) Now, Mr. Everett, have you known Bob

Whaley while he worked at the plant?
A Yes.
Q How long have you known him?
A At least from 12 to 15 years.

Q Have you ever had occasion to have called to your attention the quality of his work?

A Yes.

Q Have you ever had a conference with him about things that you might want to correct about his work and about his attitude?

A Well, I would have no reason to confer with him directly about his work. However, I conferred with him about his attitude, as you say.

Q Well, when was that that you conferred with him about his attitude?

A Early, in the early part of 1954, my brother Jack asked me to talk to Bob concerning the things that were going on in the plant. More specifically about tales, rumors, statements that Bob was making which were not true.

Q Did you talk to him about those things?

A Yes, I did.

Q About when was that?

A I would guess that it was somewhere along in, sav, March or April of 1954. I couldn't be too sure except that I do remember that it was prior to the election, that is, the election —

Q What election do you refer to?

A It was held by the NLRB for the bargaining.

Q Election as to whether or not the union would be a representative of the employees?

A Yes, that's right.

Q Now, then, when was it with reference to the first hearing before the NLRB with reference to unfair labor practices?

A I couldn't say for sure, Mr. Bonney. I was not involved in that hearing and I do not recall specifically the date of it.

Q All right. Now, then, what was said at that hearing? Just relate the conversation that took place as nearly as you can.

A At the conference between Mr. Whaley and me?

Q Not the hearing but at the conference with Whaley.

A Well, I asked Jack to — or, rather, Jack asked me to talk to Bob about this, these rumors and tales, and so on, that he was spreading, so Jack sent him to me and I told Bob what I understood had been going on and asked him if he had said the things that were attributed to him, and he agreed that he had.

Q What were those things?

A Well, for one thing, he had talked to various people in the plant concerning at least his belief that the Everetts were responsible for ruining his health. Another thing he said was that he had told them in the plant that he was expecting to be fired at any moment, and he also had, of course, talked of the

conversations been mentioned in previous testimony concerning Jack's supposed to have said that he would fire anyone who had a union card. I asked Bob if he had been spreading those tales. He said yes, he had, and I asked him why. I asked him why he had, why he felt that the Everetts had ruined his health, for example, and he talked about a bale of rubber that fell off of a fork lift and hit him in the back and we had quite a bit of conversation about that.

I asked him if that was something that the Everetts had been responsible for, and I also asked him if it wasn't a fact that his back had been injured before he ever came to work for Monkey Grip. He said it had. I also asked him if a good deal of his physical trouble was not from trouble he had had with his teeth, which he admitted was true, and along with it I asked him if we were responsible for his tooth trouble, which he said of course, we weren't. The conversation was along in those lines.

Q Did you warn him not to repeat any of those false rumors.

A Yes, I did. I told Bob that he wouldn't appreciate our going around and telling untruths about him, consequently he could expect that we wouldn't appreciate such a thing on his part and that certainly he should not tell anything, if he wanted to talk, he certainly should talk the truth, and let it go at that.

Q Now, then, after that —

A May I continue, Mr. Bonney?

Q Go ahead.

A There was another phase of that thing I mentioned where Bob had admitted saying that he had expected to be fired any minute. I asked him why he expected to be fired. He said because of his union activities.

So then I asked him if anyone had told him he would be fired and he said no, and I went on to tell him that we had not and would not fire anyone for that reason.

Q Now, then, after that, did it come to your attention that he spread other rumors?

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A Yes.

86

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Q State whether or not it came to your attention that prior to the time that he was discharged that Bob Whaley was making errors in the record keeping that was under the supervision of L. M. Everett, Jr., Luke Everett?

MR. THOMPSON:

I object again, Mr. Examiner. It's hearsay here, no showing that the person in question can't testify himself.

TRIAL EXAMINER:

No, I'll permit the answer.

A Yes.

Q (By Mr. Bonney) Now I'll ask you, did you have anything to do with the decision that Mr. Whaley would be discharged?

A Yes, I did.

Q Just tell us what you had to do with it and relate the circumstances.

A Well, it was a matter of consultation between my father and my brother and myself. I had from time to time complained

87

of conditions in the plant, particularly in the warehouse area, and when the decision was made to discharge Mr. Whaley, why, it was arrived at through a general summation of a number of factors that really governed the decision.

Q Now, were those factors discussed in a conference?

A Yes.

Q Who was present in that conference?

A My father and brother and myself.

Q Which brother is that?

A Luther, Jr.

Q Was a decision made at that time, at that conference, to discharge Mr. Whaley?

A Yes.

Q When was that?

A It was a short time before he was actually dismissed. I wouldn't say for sure, but probably two or three days. As I recall, we set the thing up to come out even on pay day or something of that sort.

Q What factors were discussed? Just tell what factors were discussed in arriving at a conclusion to discharge him.

A Well, generally that he was, well, generally speaking, an unsatisfactory employee for reason of mistakes made, for reason of attitude, for reason of his disturbance within the plant and in general an attitude that was not suitable for supervisory help.

88

Q All right. Can you give any more detail than that of these factors that were discussed?

A Well, I can give you our feelings about his attitude, and so on, which made us consider his services unsatisfactory.

Q I want the feelings at the time you made the decision and not now.

A That's right.

Q All right, just relate what they are in detail.

A All right. First we felt that he was not in sympathy with proper management practice, that is, he was antagonistic toward management to the extent that he couldn't carry out the responsibilities that rested with his capacity in the organization. That fact, plus the already mentioned mistakes and what appeared to us a physical inability to handle the job and apparently — I hesitate to use the expression, mental inability, but still let's say this, that the job he was doing had more or less outgrown his capacity. Does that make it clear?

Q Yes. Now, just tell us in some detail what his job involved and how much merchandise and how much responsibility.

A All right. See, he was in charge of the warehouse, that is, the warehousing inventory of both, primarily of raw materials and some products in process as well as cartons, labels, that sort of thing. Our purchases would run somewhere in the neighborhood of a hundred thousand or better dollars per month or roughly a million two hundred thousand dollars a year, well over

a million at any rate. His duties, of course, were to properly warehouse those materials. In that part of his job, why, he was more or less responsible to the production manager.

He also of course, had to report the receipt of this merchandise, and in accurate details because there was a great deal of money involved, and a difference, for example between a receiving report and an invoice which we would receive from our suppliers meant either dollars out of our pocket or dollars out of the suppliers' pocket, so there was a good deal involved, and in that sense, why, he was responsible to brother Luke who was in charge of purchasing.

The further responsibility within the warehousing itself, was of course, proper handling and storage of the goods because, or, rather, in order to prevent damage to the material, particularly I would say to cartons, containers which eventually would be going out to our customers in forms of finished merchandise.

Q Are there any other factors that were discussed and considered in determining that he would be discharged other than those you have already mentioned?

A There perhaps were some other reasons, Mr. Bonney. Offhand I am not sure that I can recall them. I know we did have quite a discussion over the thing.

Q Well, was he discharged, was one of the reasons why he was discharged, the fact that he had testified in a National Labor Relations Board hearing?

A No, sir.

Q How long was it that his discharge was taken under consideration?

A It was quite a period of time. I would say probably for some weeks.

Q Why was he not discharged earlier?

A Well, we didn't want to fire the man while he was testifying.

* * * * *

Q (By Mr. Bonney) Why didn't you want to fire him while he was testifying?

* * * *

A It's against the law.

91

Q (By Mr. Bonney) In other words, you didn't want to discharge him for that reason, is that right?

A. That's right.

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92

CROSS EXAMINATION

Q (By Mr. Thompson) At the time the decision was made to discharge Mr. Whaley, Mr. Everett, you were not president of the corporation, is that correct?

A That is correct.

Q Your father was, Mr. L. M. Everett?

A Right.

Q Is it not a fact that the ultimate decision to discharge Mr. Whaley was made by Mr. L. M. Everett?

A The decision was reached through consultation. Mr.

Thompson. I would assume that since he was the executive officer, that the final decision would be charged to him.

93

Q Then the answer would be yes, that it was his decision to fire Mr. Whaley, ultimate decision.

A After consultation with the rest of us, yes.

Q Is it not a further fact that his work as such, not speaking of his attitude, but his work as such was not a major concern or consideration in his discharge?

A I would say it was considered.

Q I asked you if it was one of the more important factors in reaching a decision to discharge him, a major consideration in his discharge?

A I would think so.

Q How long had Whaley been warehouse foreman?

A I can't say. I don't know.

Q Approximately how long?

A I'd say for some years.

Q More than two or three years then?

A Well, I don't know.

Q Well, at least two years prior to his discharge, put it that way?

94

A I think so, yes.

Q Is it a fact that during that entire period of time he

was handling approximately as much material as he was at the time he was discharged?

A I don't think so. You see, our business has been very fast growing business and at the time of his discharge we were doing a great deal more business than we were even a year ago, or a year or so before.

Q Is it a fact that Whaley was not specifically warned concerning his work as such prior to his discharge?

A He was not warned about his work as such by me.

Q Insofar as you know, was he warned by anyone connected with the company?

A I think so, yes.

Q By whom?

A By my brother Luke.

* * * *

Q When you and your brother and your father were discussing the Whaley situation prior to his discharge, this conference you spoke of, was there any discussion concerning the fact that Whaley had testified at the NLRB hearing whatsoever?

A I believe there was.

95

Q Going back now a bit, Mr. Everett, to the time when you were discussing the union situation and the alleged rumors that Whaley had supposedly been spreading, when you talked to him in your office at the request of your brother, did Whaley admit to you during those conversations that the alleged statements he had overheard Jack make to Mr. Talley were false?

A No.

Q Isn't it a fact that said they were true, that that had actually occurred?

A I believe so, yes.

Q Let's try to place this in point of time a little bit more clear. I am not sure that that was done on direct examination. The time you talked to Whaley is what I am talking about now.

A Yes, I know.

Q Isn't it a fact that that occurred prior to the representation hearing before the National Labor Relations Board?

A I don't know.

Q Well, isn't it a fact that it occurred within a month or two from the time that the union began to organize your plant?

A I am not sure of that, either, Mr. Thompson. I don't know what date it was on which I talked to Bob. Neither do I know the date of the representation hearing, so I can't tell you.

Q Let's place it by season then. Was it not in the spring of 1954?

A I believe so.

Q March, April or May?

A I believe it was. In fact, I testified to that.

Q In the spring of 1954, then?

A I believe so.

Q And you never personally again talked to Whaley concerning any alleged rumors after that, did you, Mr. Everett?

A I don't believe so.

Q Insofar as you know, did anyone talk to him concerning that subject of that date, I mean official of the company?

A I wouldn't say. I don't recall it.

Q Other than the letter which has been introduced in evidence, was any warning of any type given to Whaley concerning alleged circulation of rumors, insofar as you know?

A After my talking to him?

Q After your talking to him?

A As far as I know, no.

Q Specifically was there any warning given to him within a month or two months prior to his discharge in February of 1955?

A Not by me.

Q Or by anyone else, insofar as you know?

A I don't know.

* * * *

97

Q (By Mr. Thompson) At the time that your father made the ultimate decision to discharge Mr. Whaley, was he particularly active in the business.

A Yes, I believe so. He has been active off and on for the past several years, as everybody knows. Sometimes he is in the hospital and sometimes he isn't. It is a reoccurring heart condition which more or less governs his activities.

Q Were you aware that your father gave a statement concerning this matter to the National Labor Relations Board, an affidavit?

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A I believe I remember something about it, yes, sir.

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99

Q (By Mr. Thompson) I'll hand you this to see if you can verify your father's signature.

A Yes. I have seen this. I can already tell you I remember the wording.

Q I'd like to direct your attention to a particular portion of it beginning with the last paragraph on the first typewritten

100

page concerning the statement, "Whaley's work was not the major consideration in my decision to —"

MR. BONNEY:

I object to that because he is taking a statement, an ex parte statement, and asking this witness about it and thereby getting into the record something that Mr. Everett, Sr., was supposed to have signed that is not admissible in evidence.

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102

Q Is it not a fact that Mr. Whaley's immediate supervisor was Mr. Jack Everett rather than yourself or your father in the production department?

A His immediate supervisors were Jack Everett and Luke Everett. He had a dual role there to play because he had to answer to purchases in one sense and to the factory manager in another, that is, in the way he handled it in the warehouse or the way he stocked it, stores it.

Q Is it not true that the bulk of his work was supervised by Mr. Jack Everett, though, the majority of his work?

A I would say, oh, maybe 60 per cent, yes. I don't know how much of his work or time was spent in making out receiving reports, accounting and inventory, and so on.

Q Did you personally or did you ever authorize anyone to make any investigation of these alleged rumors that Whaley was supposed to have been circulating?

A Other than to ask Jack more about it when he was telling me about it, I would say no. You did ask if I personally instigated it?

Q Yes, or knew of anybody being instigated to make an

investigation if not yours, or that's really three questions. First, did you yourself do it?

A No, I did not.

Q Did you have one instigated, an investigation yourself?

A No.

Q Do you know of anyone being instigated by anyone else in a managerial capacity there at the company?

A Well, I think there was some follow-up to them, yes. In fact, I am certain there was.

Q Do you know what that follow-up was?

A Point of investigation by Jack on others under him.

Q Do you know what the investigation was comprised of?

A No, I don't.

Q What was done?

A No, except that they checked around the plant, I am sure, because, well, you had witnesses on that subject before.

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104

REDIRECT EXAMINATION

Q (By Mr. Bonney) Mr. Everett, you said that you and your brother Luke and your father had a conference regarding the discharge of Mr. Whaley. Now, at that conference, just state whether or not it was then decided to discharge him or whether it was made after that conference.

A To the best of my knowledge, it was decided then. I said that this thing was reached through consultation amongst us. I have also said that it was my father's decision. It is my feeling that that decision was made then. In fact, I left the consultation with the idea that he would be amongst the missing following the next pay day.

Q State whether or not either you or Luke Everett helped make the decision.

A I would say that we did, yes.

Q Which one of you?

A I would say both of us did.

• • • •

LUTHER M. EVERETT, JR.

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Bonney) . . .

* * * *

Q Where do you work?
A Better Monkey Grip Company.
Q In what capacity?
A Vice president, secretary-treasurer.
Q Do you know Bob Whaley?
A Yes.
Q How long have you known him?
A I believe 17 years.
Q Do you have anything to do with his work, do you have any supervision over it?
A Yes, I did.
Q You did when he was employed there?
A Yes.
Q What did he do that was under your supervision?
A He received the materials that I purchased and turned in records confirming receipt of the amounts that were supposed to have been shipped to us.
Q Was that the only kind of records that he kept for you?
A Yes, I believe so. That's basically the only records.

Q State whether or not he kept those records satisfactorily?

A Oh, I beg your pardon, Mr. Bonney. We did have — we had at that time, I believe, I know we have now, a system of accounting materials on hand, a card system, and certain types of material Bob was responsible for turning in stock on hand reports.

Q Was that a perpetual inventory, more or less?

A No, it was a periodic check on materials on hand with the use of which I determined our consumption during the previous period.

Q Now, then, state whether or not these records that he kept under your supervision were kept satisfactorily just prior to the time he was discharged.

A No, they were not.

Q Well, just state in some detail what kind of errors were in them, if any, what was wrong with them, why they were not satisfactory?

A The errors that I remember best involved errors that differed from the reporting materials that the quantities primarily of goods different from that with which were invoiced and checking into it, why, it would turn out to be either an error in multiplication or an error in addition or an error in quantity contained in any one unit; for instance, reporting 200 bags of material, two hundred —

MR. THOMPSON:

Mr. Examiner, I object to this line of

testimony. I believe if this kind of testimony is going to be permitted that the records they speak of are the best evidence and should be introduced.

TRIAL EXAMINER:

The thought was in my mind, Mr. Bonney, that if you were perhaps getting to the type of record, that is, I take it that these are written records, Mr. Luther Everett referred to cards, and so on, it might be well if we knew better the type of record that was kept. I take it as far as we have gone, from what Mr. Luther Everett has said, that there were two different kinds of records here, records of receipts of purchases made by Mr. Whaley and also a card record kept of the materials on hand, which was not a formal inventory, just a check record of the materials that are supposed to be there, which I assume Mr. Everett used in his purchasing. The complexity of records, I suppose the nature of the record keeping required would have something to do, would assume, justification for this being a reason for discharge. I'll overrule the objection, but I tell you what was in my mind.

MR. BONNEY:

Well, we could, if we had to get into the records themselves they would just prolong this hearing. We can do it.

TRIAL EXAMINER:

No, I would assume that through the witness you could explain the nature more precisely in the record keeping.

MR. BONNEY:

What was the question? Part of the answer was

given and it was interrupted.

(Record read.)

Q (By Mr. Bonney) Just finish the answer.

A Reporting bags as being 50 pound bags instead of 100 pound bags or possibly 25 pound bags instead of 50 pound bags, which multiplying the number of bags received times the erroneous quantity would give an erroneous total material received. On the cards that I mentioned, the errors there would either in counting the material incorrectly or in writing the wrong figure down after having counted it, which, if I may add, is very important in determining the quantities of material that we are consuming and the quantities of material we should carry in inventory and how often and how often we should purchase the materials.

MR. THOMPSON:

Mr. Examiner, I object to this entire line of testimony and move that it be stricken from the record, and state that General Counsel is taken by surprise on this particular line of testimony; further, if the respondent is now relying upon errors made by Mr. Whaley for the reason for his discharge, that these errors be clearly and adequately spread upon the record by way of records or in any other manner that the respondent may wish to do it.

TRIAL EXAMINER:

In other words, you are saying this, this isn't the best evidence, that they ought to have the records here that can cite the mistakes made?

109

MR. THOMPSON:

They are claiming now that mistakes were one of the reasons for his discharge, but offering no proof of mistakes other than the testimony and referring to records which substantiate their claim.

MR. BONNEY:

I think that goes to the weight of the testimony.

TRIAL EXAMINER:

I don't think, Mr. Thompson, I'd be justified in striking the testimony. I think Mr. Bonney took the words out of my mouth. I think it goes more to the weight to be given to such evidence and to its materiality or relevancy or as to what is the proper proof. I will deny the motion to strike.

* * * *

Q (By Mr. Bonney) Give in some detail what information is on the record of incoming materials that Mr. Whaley made, just give it column by column what goes into it.

A Mr. Whaley customarily showed whether the freight was prepaid or collect, which is very important. He showed the number of units received, the quantity of material in each of those

units and attention of that quantity multiplication showing the total quantity received.

He also had to show the full description of the material as we knew it, not necessarily the full description that was shown on the invoice, but common terminology there in our plant.

Q Any other information?

A The name of the shipper from whom the material was received, the truck line that delivered the material, and I believe the gross weight of the entire shipment, including tare.

Q State whether or not these records were kept individually for each invoice or would more than one invoice merchandise go on one sheet or just the representation of one invoice?

A In most cases there was an individual receiving report for each invoice. One or two of our suppliers would have several invoices covering one shipment, thinking specifically of R. C. Can Company in Arlington, wherein our truck picked up the empty cans and brought them over to our plant and the can company sometimes made up the shipments ahead of time and had them written up on individual tickets, which resulted in two or possibly more invoices.

Q Now, state whether or not you ever called these mistakes to Mr. Whaley's attention.

A Yes, I did.

Q Did you do it more than once?

A Yes, on numerous occasions.

111

Q Did you do it very long before his discharge or very a very short time before; with reference to the time he was discharged, about when did you give it to him?

A Well, there were times that I called the errors, such errors to his attention during his entire duty as warehouse man and receiving foreman, but the more recent months, I would say the last two or three months, it was very definitely an increase in the number of errors to the extent of being a nuisance.

Q Well, I'll ask you now whether you called those more recent ones to his attention?

A Yes, I am sure I did. I don't know that I could name specific times or incidents, but I do know that I from time to time called his attention to them.

Q I will ask you whether or not you had anything to do with making the decision to discharge Mr. Whaley.

A Yes, in the form of a consultation and recommendation on my part.

Q Who did you have that consultation and who did you make that recommendation to?

A With my father, L. M. Everett, Sr., and my brother Tommy.

Q Now, then, was Jack Everett your brother?

A Yes.

Q Was he in the consultation, too?

A Not the last consultation, as I recall.

112

Q Why was he not?

A I believe he was out of town.

Q Did you make any recommendation to your father about discharging Mr. Whaley?

A Yes, I —

Q What was the recommendation?

A — called to dad's attention the numerous errors that had been made and that in my mind he was unable to give us the type work that we should expect from foremen and needed in order to make good judgments or decisions in regard to purchasing materials.

Q You said you were in conference with your father and Tommy Everett about discharging him. Could you relate what things were considered in the discharging of him at that time, at the conference, that last conference?

A Yes. In addition to the errors which were my basic recommendation, that's where I entered into the question mostly, I suppose from a departmental standpoint, we discussed the things that we felt we were entitled to from a foreman, we discussed his physical inabilities and his general attitude. We discussed the need for harmonious relations among our employees as a group, everyone working together, and the fact that Bob was apparently unable to command the respect of his fellow employees, and in fact irritated the other employees in one way or another such as the false rumors and so forth.

113

Q Did you discuss or consider any particular false rumor that had been called to your attention?

MR. THOMPSON:

I object, Mr. Examiner. We are getting back to the hearsay again.

TRIAL EXAMINER:

I will sustain the objection.

MR. BONNEY:

I can prove whether or not later. I want to know now whether they considered it and then I will go into whether he knew it or not. Anything that is reported to them by employees is something they can take into consideration. They don't have to see everything. You can discharge an employee without seeing everything that he does, if we can prove that it happened and that it's called to their attention, so we would like to conduct this testimony to prove those things. First I want to know whether he did consider it. If not, there is no use in going further with it.

TRIAL EXAMINER:

Well, if I understand the question correctly, perhaps I wasn't listening too closely, it was whether or not any reports had come —

MR. BONNEY:

No, sir, I asked him if they considered any reports of false rumors, that whether it made —

TRIAL EXAMINER:

At the time they were discussing this matter of possible discharge. Well, I'll permit the answer.

A Yes, we did.

Q (By Mr. Bonney) Now, which particular one did you consider?

A The one I believe about our having ruined his health, and

I knew about the story he was spreading that the union was —

MR. THOMPSON:

I object to that portion of the answer. It's not responsive to the question. It's volunteering information by the witness.

MR. BONNEY:

I think it is responsive. I asked him which ones he considered.

MR. THOMPSON:

The witness testified that he knew, Mr. Bonney, not that they discussed it.

TRIAL EXAMINER:

Go ahead. I think that we can shake it out. I think technically you are right, Mr. Thompson, but actually the witness is answering in his own words. He started to say he himself knew about the rumors. Go ahead, Mr. Everett.

A I knew about the story he was telling to the effect that the union or that the — if the union had done nothing else, they had at least gotten us a pay raise which was coming through the next week. Now, whether or not it was discussed as at that very last consultation or whether I learned of it a day before that or a few hours before that, I couldn't say. I am sure that we did discuss it at that, I am ninety percent sure that we did discuss it at that last conference.

Q (By Mr. Bonney) Well, did you or did you not con-

sider that in arriving at your decision to recommend his discharge?

A My own recommendation as relating to my direct work with Bob was on the errors. My recommendation as one of the partners of the firm, one of the officers of the firm, did take that into

consideration on the belief that unsympathetic attitudes to the extent of telling falsehoods certainly indicated that we couldn't count on Bob for the duties naturally expected of a foreman.

* * * *

CROSS EXAMINATION

Q (By Mr. Thompson) I think you have testified, Mr. Everett, that you called some of these errors to Mr. Whaley's attention?

A Yes.

Q Did you ever tell him that if he didn't straighten out he would lose his job?

A I don't believe I ever threatened him with that, that possibility, not by direct words.

Q What sort of things did you tell him when you pointed out these supposed errors to him?

A My pointing out these errors to Bob in itself was —

Q Just what did you say to him?

A — correction or warning.

Q What did you say? What did you tell him when you pointed out these errors to him?

A In the most part I was asking him for clarification of the errors to determine whether they did or did not receive such and such material, in other words, to straighten out my records, my payables records.

Q Just questioned him about these mistakes?

116

A I think whether or not I ever pointed my finger at Bob and said "Now you are going to get fired if you don't straighten up," I don't believe I ever did that. I don't think it was necessary. I don't think it would have been in order. I don't think it would have accomplished the results that an employer wants to accomplish when he talks with an employee. My main concern in calling those errors was to straighten up my records and also to point out to Bob that I expected him to be more accurate and I needed him to be more accurate.

* * * *

Q (By Mr. Thompson) During the conference or in the conference when the decision was made, what was the main reason for

117

deciding to discharge Whaley, or was there a main reason, I'll ask you first, a single reason, a single main reason?

A My own reaction or the —

Q You were there, you know what was said. I was merely asking you was there a main reason, a main reason, a one thing.

A. I don't believe I can testify to the intermost feelings of Tom and dad.

TRIAL EXAMINER:

That's not the question, Mr. Everett. The question is at that meeting was there an essential reason decided upon for the discharge of Mr. Whaley, unsatisfactory work or physical disability or attitude, was there a single essential reason decided there to go to the discharge of Mr. Whaley? Figuring it another way, what does the employment record show the reason for his discharge?

THE WITNESS:

The reason for discharging Bob was generally unsatisfactory circumstances, meaning his attitude, a combination of his attitude, his errors in his work, which I personally felt was due to poor attitude, and to the general conclusion that Bob had not been satisfactory in any way as an employee and that we had no reason to suspect that he could improve after so long a time. I think most of the testimony put together, I mean my testimony about attitude and in harmonious relations with our other employees add together to have dictated that we fire Bob.

Q (By Mr. Thompson) Then it wasn't the errors alone or the

alleged physical inability alone or any other one thing alone, is that correct?

A Not to my knowledge, not as I recall.

* * * *

MR. BONNEY:

Now, respondent would like at this point to renew its motion to dismiss that the court reserved until it heard additional evidence.

TRIAL EXAMINER:

I'll reserve decision on your motion to dismiss, Mr. Bonney, and dispose of it in my Intermediate Report.

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119

MR. BONNEY:

I would like to make a brief statement and file a brief. The reason I would like to make a brief statement is that I might get tied up and can't file a brief, but I think that I can, but just in case I would at least have something in the record.

* * * *

MR. BONNEY:

I would like to make this argument both on the motion and as to the evidence, because I think some of it will be the same. It's respondent's contention that first General Counsel has not made a prima facie case under the pleadings in that he has not proved under 8 (a) (1) that a single member of the union or a single employee has been prejudiced as to any of its rights as contemplated in Section 8 (a) (1) and Section 7; in other words, there has been no proof and there is no pleadings, for that matter, to the effect

that there is any union activity of any kind in the plant and that

120

a single soul in the plant or elsewhere even knew about this discharge of Mr. Whaley or even considered it at all in considering their rights under the Act, and particularly under Section 7 and 8 (a) (1). The General Counsel has the burden of proof, and we think he has not met that burden.

The same thing we would say with reference to violation alleged under Section 8 (a) (4), we still contend that an employee as used in Section 8 (2) (4) means an employee as defined in the Act and not a supervisor, and that it is not a violation of the Act to discharge a supervisor for testifying in a case under the Act. However, we think that the proof does not show even a prima facie case that he was discharged for testifying. He was not discharged for more than seven or eight months after he first testified. He was not discharged for about a month after he last testified. It is undisputed in the record that Mr. Whaley was discharged for specific causes, a number of them which all amounted to unsatisfactory service. The letter that was sent to him used that term. The testimony of the two vice presidents was to the effect that there was a meeting of the president and two vice presidents on the subject of discharging Mr. Whaley, and that a number of things that have been going on a long time added up to him not being able to handle the job any more. These things, or in particular the fact that he made numerous errors that had increased just be-

fore his discharge, on the records that he kept, secondly he had a

121

bad general attitude and didn't get along with the employees, and they didn't like him and they didn't make for congeniality in the plant. He was a spreader of rumors, false rumors.

Now, one of those rumors was proved by Miss Cribbs and another lady, whose name I can't remember, followed her and testified that Miss Cribbs told her about hearing Mr. Whaley spread this rumor within a few days after it was done. That testimony is not disputed. Mr. Whaley didn't dispute it. I believe it. Especially do I believe it because another witness she told it to her within a few days afterward and she didn't even know then that it was material to this hearing or any other hearing.

Should a supervisor have the right to spread rumors that would hurt the company? They are representing management and they spread rumors because of their prejudice on behalf of the union. They want to see a union come in there, and so they spread rumors around that a union has gotten pay raises. I think that within itself is enough to discharge a man and that was considered when he was discharged later, and so you would expect a supervisor to be the opposite from what Mr. Whaley was to be cooperative with management and keep down rumors rather than being the source of them.

He was given a letter, which is in evidence, warning him about rumors; right after the first hearing he was said to have circulated rumors that he had won the fight for the union and

he was of some concern in the matter and he was warned against that. He was warned against making so many errors in these records.

Now, that is all the evidence of the respondent, but what is the evidence of the General Counsel? There's not any evidence except that he testified, and that his testimony was adverse. That's all. Now, how long does management have to keep a man employed that testifies in a hearing if he is adverse to them? Does that perpetuate him in his job or can management say "Well, I can fire this man because he is not satisfactory generally" and give a number of reasons in his own mind why he should be discharged. I think he was discharged for cause, several causes that all amounted to being unsatisfactory. These were tolerant people. The evidence shows that. They could have wacked him off the first time he crossed his foot over the line, but they didn't do it. They kept him on. They let him testify in these hearings. They knew that he was hurting them, but that's all right. They let him testify. They didn't fire him for cause then. They went on and let it accumulate and fired him, because they did it for cause. Otherwise they would have fired him the first time he testified, the sun wouldn't have gone down unless he was discharged.

It's our view that if this company can't fire Bob Whaley for the reason they did, then that you just can't fire any man that's ever testified against you in a hearing, so we say that

123

General Counsel has not met his burden and that any smattering of a burden that he has reached has been far overcome, we think by the real reasons that are set out in the testimony for a discharge, so we ask that first that the motion be sustained and the case be dismissed, and if that is not done that it be held that this man was discharged for cause. That's all of the argument.

• • • •

A Yes, sir.

Q Did you have to tell them you were ready to go to work?

A Yes, sir.

Q Did you have to tell them you were willing to go to work?

A Yes, sir.

Q Did you have to tell them you were able to go to work?

A I was for light work; I asked for light work. I couldn't do heavy work.

Q Did you get full benefits for unemployment during that five weeks?

A Yes, sir.

Q Have you ever applied for unemployment benefits at any other time?

A Well, it has been a long time.

Q How long ago?

A First, twenty-second, 1940, I believe.

Q 1940?

A I think that is what it reads.

Q Whereabouts do you live, Mr. Whaley?

A At Arlington.

Q Where, in Arlington?

A 815 Scott Drive.

Q How long have you been living there?

I got hit, you know, it popped my head backward and forward and made me stiff-necked.

Q Did you claim you were permanently disabled?

A No, sir.

Q What?

A No, sir.

Q Well, what did you claim?

A Well, just that I wasn't able to do the work that I used to do because it was too painful for me and I couldn't rest at night.

Q Did you get any money on account of that suit?

A Yes.

Q How much?

A Well, to my part I got Sixteen Hundred.

Q Did you work while that suit was pending?

A Yes, sir.

Q You worked right along?

A Yes, sir.

Q Regular work?

A Yes, sir.

Q And your part was Sixteen Hundred, is that right?

A That is what I netted, yes, sir.

Q Well, didn't you claim you were permanently disabled in that lawsuit?

A Not that I remember of.

Q I notice when you walk, you sort of walk stooped over?

A Yes, sir.

Q How long have you been walking like that?

A Well, since this last injury I can't straighten up on account of the injury across my kidneys, that I had this last time.

Q Well, you walked stooped over after that other accident, didn't you?

A Very little; it was mostly because of my neck.

Q Well, you walked stooped over and said you couldn't walk standing up, didn't you, in that other lawsuit?

A Well, no, not like I do now.

Q Well, what is the difference?

A Well, there is quite a bit of difference. I just can't — just bent over more than I ever was. In fact, I can't lay on my stomach at all now, after this last injury.

Q And it is your testimony that the only thing you were complaining of at that time is your neck?

A Yes, sir.

Q Is that right?

A So far as I know, it is.

Q Well, you know where you were hurt, don't you?

A Well, it was right at the base of my neck, is where it was.

Q Is that the only place where you had pain?

A Yes, the x-ray man.

Q How did you happen to go to those doctors?

A I was sent there by Mr. Harless.

Q Are you satisfied with the treatment they gave you?

A Yes, sir.

Q You thought they were pretty good doctors?

A I think so.

Q Well, have you had any other injuries of any kind?

A Only those other two back injuries that I got out at the plant. They had — there was a report on that where I went up to Altick up there.

Q When was that?

A I believe one of them was about five years ago and the other about seven.

Q Did you lose any work?

A No, sir.

Q Your back has just been bothering you for years, hasn't it?

A Only when I got hurt out yonder — the only time it has bothered me to amount to anything.

Q Well, when were these other two back injuries?

A They were out at the Monkey Grip.

Q When?

A Along about five years ago and the other about seven, just about, approximately — I don't know for sure.

don't know which, but they didn't give me any reason.

Q When did they fire you?

A Because I was getting crippled and wasn't able to do as much as they wanted me to, to start with.

Q When did they fire you?

A I don't remember the date exactly.

Q Well, was it just before you went over there for these employment benefits?

A Yes, sir.

Q You worked about a week after you claim you got hurt?

A No, a little bit longer than that, two or three weeks — two weeks, I think.

Q How did you get hurt?

A I was straightening up some skids with a fork truck and there was — has a metal bottom in it and when that gets damp or wet or something, it gets real slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped over against the sides — it has got ribs up and down it, you know, and it caught me right in the center of my

back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions.

Q Didn't you usually use a fork truck out there in your work?

A Well, I had used it for three or four years and then they got a man to drive it altogether. Well, they decided to move him to another job and they were going to put another boy on it; they moved him on to another job Wednesday and they were going to put another boy on it on Monday; so I had to have some work done with it, so I used it myself then.

Q All you were doing was stacking these skids?

A Stacking skids, yes, sir.

Q Did somebody tell you to do that?

A No, sir, I was my own boss out there. I do everything that I see that needs to be done, I do it.

Q What was your job out there?

A Receiving clerk.

Q You say you fell into a bin?

A Yes.

Q And it was next to a loading dock?

A Yes.

Q And you fell down into the bin from the fork lift?

253

GENERAL COUNSEL'S EXHIBIT No. 2

To You from

BETTER MONKEY GRIP COMPANY
Manufacturers

Tire and Tube Repair Materials
"MONKEY GRIP" and "BETTER" Brands
Molded Rubber Products

P. O. Box 6170
5320 Harry Hines Boulevard
Dallas 2, Texas

Owned and Operated By
L. M. EVERETT,
President
L. M. EVERETT, JR.,
V. Pres., Sec'y-Treas.
J. R. EVERETT,
V. Pres.—Production
T. H. EVERETT,
V. Pres.—Sales

February 18, 1955

Mr. R. L. Whaley
Better Monkey Grip Company
Dallas, Texas

94

Dear Bob:

As your employment in our organization is presently unsatisfactory to management, it is hereby terminated as of today.

In lieu of advance notice we are enclosing, in addition to your time through today, two weeks' additional pay. Since you have worked approximately six months since your last paid vacation, we are also enclosing one weeks' unused vacation pay, in line with our vacation policy.

Yours very truly,

BETTER MONKEY GRIP COMPANY
By L. M. EVERETT
President.

L. M. Everett/b
Enclosures

254

GENERAL COUNSEL'S EXHIBIT No. 3

To You from

BETTER MONKEY GRIP COMPANY
Manufacturers

Tire and Tube Repair Materials
"MONKEY GRIP" and "BETTER" Brands
Molded Rubber Products

P. O. Box 6170
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L. M. EVERETT, JR.,
V. Pres., Sec'y-Treas.
J. R. EVERETT,
V. Pres.—Production
T. H. EVERETT,
V. Pres.—Sales

July 21, 1954

Mr. Robert L. Whaley
Arlington, Texas

Dear Bob:

It has come to my attention from different sources that you are making statements to employees regarding the NLRB

hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.

These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known by anyone.

We feel that these malicious statements are harmful to the company and employees to the extent that we must insist they be stopped.

Any repetition of such actions will force us to request your resignation.

Sincerely,

BETTER MONKEY GRIP COMPANY
By JACK EVERETT
Plant Manager

J. R. Everett:mjd

256

RESPONDENT'S EXHIBIT No. 1

THE STATE OF TEXAS
to
TRADERS AND GENERAL INSURANCE COMPANY,
A CORPORATION, DEFENDANT

You the said defendant are hereby commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A.M. of the Monday next after the expiration of 20 days after the date of service hereof before the 14th Judicial District Court of Texas at the Courthouse in the City of Dallas, Dallas County, Texas, said plaintiff being Robert L. Whaley.

Filed in said Court on the 2nd day of June, 1955, against Traders and General Insurance Company for suit, said suit being Numbered 104144-A, the nature of which demand is as follows: Compensation, etc. as shown by said petition, a copy of which accompanies this Citation.

If this Citation is not served within 90 days after date of its issuance, it shall be returned unserved.

WITNESS, BILL SHAW, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and the Seal of said Court at office in the City of Dallas, this the 2nd day of June, 1955.

ATTEST: BILL SHAW
Clerk of District Court of Dallas County, Texas.
By JOHN H. NORMAN, Deputy.
John H. Norman

257

PLAINTIFF'S ORIGINAL PETITION

In The District Court
Dallas County, Texas
— Judicial District

(Filed: June 2, 1955)

No. _____

Robert L. Whaley
vs.
Traders and General Insurance Company

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Robert L. Whaley, hereinafter styled plaintiff, complaining of Traders and General Insurance Com-

pany, hereinafter styled Defendant, and for cause of action would show the court as follows, to wit:

I.

That plaintiff is a resident of Arlington, Tarrant County, Texas; that the defendant is a corporation duly incorporated under the laws and doing business in the State of Texas with its principal office being located at Post Office Box 6291, Dallas, Dallas County, Texas, where service may be had upon its agent.

II.

Plaintiff would show the court that on or about the 10th day of February, 1955, while in the employ of Better Monkey Grip Company, of 5320 Harry Hines Boulevard, in the City of Dallas, Dallas County, Texas, in the capacity of a warehouseman, at an average wage of $58.84 per week, he was engaged in the operation of a fork-lift truck in loading and unloading supplies from the dock of said company; that while operating said machine, plaintiff slipped and fell forward into a metal scrap bin located on said dock and landed on his head and hands, with his back and legs hitting the side of said bin; that said accident occurred at or about 10:30 o'clock A.M. on said date and that this fall into the said scrap bin caused him to suffer immediate excruciating pain in the middle and upper back region; that such injury was immediately known to his superior officers in the said company.

258

III.

Plaintiff would show the court that the cartilaginous materials, bone, muscles and tendons in the middle and upper back region have been severely strained, bruised, torn and lacerated as a result of the fall into the said bin, as aforesaid; that immediately after said fall and for some seven or eight working days thereafter, plaintiff continued to suffer pain in said back area, but in spite of said difficulty, attempted to carry on in his employment, but that thereafter, on or about the 21st day of February, 1955, plaintiff had been unable to perform the normal task of a workman in his employment, and has been unable to do any manual work or labor whatsoever.

IV.

Plaintiff would show the court that at the time of the accident, the Better Monkey Grip Company, was a carrier of Workmen's Compensation Insurance with the defendant, Traders and General Insurance Company, which said policy of insurance, among other things, provided that plaintiff be entitled to receive the sum of $25.00 per week for a period of time not to exceed 401 weeks in case plaintiff sustained total and permanent disability or total incapacity for the performance of work; that said insurance was for plaintiff's benefit as well as for the benefit of plaintiff's employer, and that the policy of insurance in force and effect at the time plaintiff sustained the injury herein de-

scribed, was and still is in the possession of said insurance company, and notice is hereby given to the defendant insurance company to produce said policy in court at the time that this cause is tried, or secondary evidence will be offered by plaintiff to prove and establish the contents thereof.

V.

Plaintiff states that notice of injury was filed with the Industrial Accident Board on or about the 28th day of February, 1955, and that claim for compensation was filed with the Industrial Accident Board on or about the 28th day of February, 1955, and that the

Industrial Accident Board of the State of Texas entered its final award and decision on the 13th day of May, 1955, a photostatic copy of which is attached hereto for jurisdictional purposes only.

VI.

Plaintiff would show the court that thereafter on or about the 21st day of May, 1955, plaintiff, by and through his attorney, gave notice in writing that he was unwilling and would not abide by the award made and entered by the Industrial Accident Board, on the date aforesaid, and would within twenty days after the giving of such notice, file suit in a court of competent jurisdiction to have the claim of plaintiff tried and adjudicated before a court of competent

jurisdiction as provided by the laws and statutes of the State of Texas, and that this petition is filed in due and seasonable time, in pursuance of said notice of plaintiff to file same.

VII.

Plaintiff states that as a result of the injury aforementioned, his upper and middle back area and the surrounding area were so damaged and injured that he is now unable to walk upright, and that he is unable to lift any heavy object without suffering pain, or to stand on his feet for any appreciable length of time; that he is unable to stoop, bend, or turn in any way without suffering severe pain in his back area; that the muscles, muscular attachments and cartilaginous materials surrounding the upper and middle back area have been injured in such a manner as to limit the bending and flexation of his back; that as a result plaintiff has lost the use of his back, and as a matter of fact, the ability to do any work whatsoever; that he is now suffering traumatic arthritis in his back, and that all of this was the direct and proximate cause of the accident, as aforesaid.

Plaintiff would show the court that since the date of the accident herein complained of, and in consideration of said accident, he is and has been unable to obtain or retain a job performing

work and labor for which he was trained and able to perform prior to said injury.

VIII.

Plaintiff alleges that if he be mistaken in that the aforesaid accident caused the arthritis to develop in his back, then he alleges that such accident to his back aggravated a pre-existing arthritis condition in his back; that his present disability was not solely caused by any such pre-existing arthritic condition, if any, but if there was a pre-existing arthritic condition of the plaintiff's back, it was severely aggravated by the fall and accident, and plaintiff says that as a result of such aggravation he has not been able to do the work that he had been trained and to work that he had been doing for over fifteen years, and has been unable to perform any type or character of work requiring manual labor, or the usual tasks of a workman, and will be unable to do or perform any kind or character of manual work to which he has been accustomed for the rest of his natural life.

IX.

Plaintiff would show the court that since the date of the accident herein complained of, and in consideration of said accident, he is, and has been unable to obtain or retain a job performing work and labor for which he was trained and able to perform prior to said injury.

X.

Plaintiff states that prior to said injury, he was an able-bodied and healthy man, and had no physical impairment or disability; that as a result of the injury, as aforesaid, he alleges that he has become permanently and totally disabled, to his damage in the sum of $25.00 per week for a period of 401 weeks.

IX.

Plaintiff states that if he should be mistaken in that he is not totally and permanently disabled, then he alleges that he is disabled to the extent of at least 75 per cent, and he is entitled

to his compensation on the basis of 75 per cent disability, or whatever amount the jury might determine.

XII.

Plaintiff would further show the court that at the time of the accident herein described, he had been employed by the Better Monkey Grip Company for a period of approximately seventeen years.

XIII.

Plaintiff would show the court that he is a man of some business ability and training, and if paid his compensation in a lump sum, he can invest it and aid in making a living for himself and his family, and thereby save the principal due and owing; that if his compensation is paid to him in weekly installments the same will be used by plaintiff and his family for the bare essentials of life and will be spent as the same comes in, and there will not be enough to invest in a business; that unless his compensation is awarded to him in a lump sum, a manifest hardship and injustice will result to plaintiff; and plaintiff respectfully requests that whatever amount of compensation be awarded, that it be paid in a lump sum.

WHEREFORE, premises considered, plaintiff prays that the defendant, the Traders and General Insurance Company, be cited to appear and answer herein; that upon final hearing hereof, plaintiff be awarded judgment for the amount of $25.00 per week for a period of 401 weeks, less the discount allowed by law; that such amount be ordered paid to plaintiff in a lump sum; that if plaintiff fails to establish that he is entitled to the full amount of $25.00 per week for a period of 401 weeks, then plaintiff prays that he be awarded such amount as the evidence and testimony in this case will show, and that he be awarded such percentage of total disability as may be fixed and determined by the jury, and that this amount be ordered paid in a lump sum; and for such other and further relief, special and

general, in law or in equity, to which he may show himself justly entitled.

GREEN, BYRON & WRIGHT
and CHANEY & HARLESS
By FRED S. HARLESS
Fred S. Harless
1814 Life of America Bldg.
Dallas, Texas
Attorneys for Plaintiff

Page 5.

262

CLERK'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, BILL SHAW, Clerk of the District Court in and for the County of Dallas, do hereby certify that the above and foregoing is a true and correct copy of CITATION AND PLAINTIFF'S ORIGINAL PETITION as same appears on file in my office, in cause No. 104144-A, entitled ROBERT L. WHALEY VS. TRADERS AND GENERAL INSURANCE COMPANY, A CORPORATION, filed on the 2nd day of June, 1955.

WITNESS my official seal and signature at office in the City of Dallas, this 7th day of November, 1955.

BILL SHAW
Clerk of the District Courts.
Dallas County, Texas
By /s/ Fred Fletchner Deputy
Fred Fletchner

(SEAL)

263

JUDGE'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, SARAH T. HUGHES, Judge of the District Court of the ____ Judicial District of Texas, in Dallas County, do hereby certify, that Bill Shaw, whose genuine signature appears signed to the Certificate below, is the duly elected, qualified and acting Clerk of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY of all of which I hereunto sign my name and affix my official seal at office in the City of Dallas, Dallas County, Texas, on this the 7th day of November, A. D. 1955.

/s/ Sarah T. Hughes
Judge of the 14th District Court,
Dallas County, Texas

(SEAL)

CLERK'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, BILL SHAW, Clerk of the District Courts, within and for the County of Dallas, and State of Texas, do hereby certify that Judge Sarah T. Hughes, whose genuine signature appears signed to the above and foregoing Certificate is the duly elected, qualified and acting Judge of said Court, and was at the time of so signing same, and that said Certificate is in due form of law.

IN TESTIMONY OF ALL OF WHICH I hereunto sign my name and affix my official seal at office, in the City of Dallas, Dallas County, Texas, on this the 7th day of November, A. D. 19

BILL SHAW
/s/ Bill Shaw
Clerk of the District Courts
of Dallas County, Texas

(SEAL)

Office - Supreme Court, U.S.
FILED
AUG 27 1957
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BONNEY, WADE & STUBBLEFIELD,
1133 Fidelity Union Life Building,
Dallas, Texas.

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	
Question 1	3
Question 2	3
Question 3	3
Question 4	3
Question 5	4
Summary Statement of the Matters Involved	4- 7
Presentation of Questions	
Question 1—(Restated)	7-21
Question 2—(Restated)	21-30
Question 3—(Restated)	30-36
Question 4—(Restated)	36-37
Question 5—(Restated)	37-38
Conclusion	39
Appendix	41
Decision and Order of the N. L. R. B.	43
Orders of N. L. R. B. Denying Petitioner's Petition for Reconsideration and Alternative Motion for Remand	50
Opinion of the U. S. Court of Appeals for the Fifth Circuit	51
Order of the U. S. Court of Appeals for the Fifth Circuit Denying Rehearing	54
Decree of the U. S. Court of Appeals for the Fifth Circuit	55

Page

Boeing Airplane Company v. N. L. R. B., 140 F. 2d 423 at 433 (C. A. 10) 18

Farmers Co-operative Company v. N. L. R. B., 208 F. 2d 296, at 303 29

Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, at 616-617 (C. A. 7) 20

Pedersen v. N. L. R. B. case, 234 F. 2d 417 (C. A. 2) 35

Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 74 S. Ct. 323 20

Universal Camera Corp. v. N. L. R. B. case, 340 U. S. 474 20

White v. Mechanics Securities Corp., 269 U. S. 283 16

N. L. R. B. v. Houston Chronicle Pub. Co., 211 F. 2d 848, at 854-855 (C. A. 5) 18, 29

N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 144-146 (C. A. 5) 19

N. L. R. B. v. Reynolds & Manley Lumber Co., Inc., 212 F. 2d 155, 158 (C. A. 5), cert. den., 346 U. S. 877 19

N. L. R. B. v. Sunset Minerals, Inc., 211 F. 2d 224, at 226 (C. A. 9) 20

N. L. R. B. v. Talladega Cotton Factory, Inc., case, 213 F. 2d 208 33

N. L. R. B. v. Vail Manufacturing Co., 158 F. 2d 664 (C. A. 7) cert. denied, 349 U. S. 905 25

	Page
5 Am. Juris., 311-312	16
20 Am. Juris., pp. 501 and 539	16
41 Am. Juris., p. 435	16
14 A. L. R. 36	16
14 A. L. R. 56	16
90 A. L. R. 1398	16
7 C. J. S., pp. 920-921	16
31 C. J. S., pp. 1071-1077	16
71 C. J. S., pp. 147-152	16
McCormick & Ray, Law of Evidence, Vol. 2, p. 62	16

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

BETTER MONKEY GRIP COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Better Monkey Grip Company, respectfully petitions this Honorable Court for a writ of certiorari to review the opinion and decree of the Court of Appeals for the Fifth Circuit, entered on May 1 and June 18, 1957, ordering enforcement of a decision and order of the National Labor Relations Board issued against Petitioner on April 30, 1956.

OPINIONS BELOW

The *per curiam* opinion of the court below, a copy of which is set forth in the Appendix, *infra*, p. 57, is reported at *243 F. 2d 836*. Copies of the decree entered by the court below and the court's order overruling Petitioner's petition for rehearing and reargument are also set forth in the Appendix. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 202-207),[1] a copy of which is set forth in the Appendix, *infra*, p. 43, is reported at 115 N. L. R. B. 1170-83.

JURISDICTION

The decree of the court below was entered on June 18, 1957, after the court had denied Petitioner's request for rehearing and reargument on May 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, hereinafter referred to as the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C., Sec. 151, et seq.), are Sections 8(a) (1), 8(a) (4), and 10(c), (d) and (e). Copies of these Sections are set forth in the Appendix, *infra*, p. 41.

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[1]The references designated "R." refer to the numbers appearing in bold face type, singly, on separate lines of the "Transcript of Record," printed as Volume I. References designated "J. A." refer to numbers appearing in bold face type, singly, on separate lines of the testimony and exhibits printed as a joint appendix.

QUESTIONS PRESENTED

QUESTION 1

Whether the court erred in finding that the Board's conclusion that petitioner discharged Whaley, a supervisor, for giving testimony adverse to its interests at a prior board hearing is supported by substantial evidence on the record as a whole.

QUESTION 2

Whether the court erred in refusing to remand these proceedings to the Board under Section 10(e) of the Act for the purpose of taking additional testimony.

QUESTION 3

Whether the court erred in finding that Petitioner's conduct in terminating Whaley's employment constitutes an independent violation of Section 8(a)(1) of the Act.

QUESTION 4

Whether the court erred in denying Petitioner's request that the Board's order, which orders full and immediate reinstatement to Whaley in his former or a substantially equivalent position, be modified to provide that such reinstatement be contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work.

QUESTION 5

Whether the court, under the record facts, erred in entering the decree ordering Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the N. L. R. B.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

In its decision and order the Board found that Petitioner had terminated the employment of a supervisory employee, Whaley, because he had given testimony adverse to its interests in a prior Board hearing, and that such conduct violated Section 8(a)(1) of the Act. In defense of its action, Petitioner alleged that Whaley's services were generally unsatisfactory and that he was physically incapable of properly performing his duties (R. 162). Whaley readily admitted that he was injured while working for Petitioner, that such injury occurred approximately ten days prior to his termination, and that he instituted a workman's compensation suit against Petitioner's insurance carrier based on such injuries.

Whaley, a supervisor, testified at a prior Board hearing held on July 17 and 19, 1954, that he overheard Petitioner's plant manager, Jack Everett, make certain anti-union statements. The trial examiner in this prior case issued his intermediate report on August 21, 1954, and on three dates thereafter, September 7 and 8, 1954, and January 28, 1955,

the matter of the truthfulness of Whaley's testimony given at the hearing and the nature of the statements attributed to Jack Everett were the subject of discussion between Petitioner and Whaley, and upon the conclusion of such discussions Whaley was asked if he would tell the truth and thus change his prior testimony. This prior case was remanded to the Board's regional office for the taking of additional testimony, and a rehearing was held on January 28, 1955. Approximately three weeks later, February 18, 1955, Whaley received a letter terminating his employment because his services were presently unsatisfactory. The trial examiner concluded that supervisor Whaley "was discharged because of his known views concerning the Union and because he testified in a proceeding under the Act" (R. 168), and found that such conduct by Petitioner violated Section 8(a) (4) and (1) of the Act. The Board adopted the trial examiner's factual findings, but concluded that Petitioner had violated Section 8(a) (1) of the Act only, stating that "as the remedy would be the same, we find it unnecessary to consider whether the discharge also violated Section 8(a) (4) of the Act." (R. 203.) The Board's order, *inter alia*, ordered Petitioner to offer Whaley full and immediate reinstatement and to make him whole for any loss of pay he may have suffered. The Board, however, fully recognizing that Whaley suffered a back injury shortly before his termination and the likelihood that he was physically unable to perform his required job

duties at the time of such termination, provided that "back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties" (R. 205, 204). The Board's order, did not, however, provide that Whaley's reinstatement was to be made conditional upon his physically being able to perform required duties. Rather, the Board's order dictated that Whaley, regardless of physical condition, be immediately reinstated.

On July 23, 1956, following the Board's decision and order, Petitioner, on the basis of evidence which it had no reason to know existed at the time of the hearing before the Board, submitted to the Board a petition for reconsideration and, in the alternative, motion for remand for the purpose of adducing additional evidence on the question of whether Whaley was in fact terminated because of the physical injuries suffered prior to his termination. In support of such petition and alternative motion, and attached thereto as exhibits, Petitioner submitted true copies of the pages of sworn testimony taken by the official court reporter of the Texas state district court in the workman's compensation suit filed by Whaley (R. 244-249).

Thereafter, on August 10, 1956, the Board denied Petitioner's petition for reconsideration on the ground that "Nothing has been advanced that was not properly considered by the Board," and likewise denied its alternative motion for remand because it only "related to a question of compliance and is therefore premature at this time."

(R. 250.) On April 9, 1957, the case was heard before the court below. The Court by *per curiam* opinion ordered the Board's order enforced.

PRESENTATION OF QUESTIONS

QUESTION 1—(Restated)

Whether the court erred in finding that the Board's conclusion that petitioner discharged Whaley, a supervisor, for giving testimony adverse to its interests at a prior board hearing is supported by substantial evidence on the record as a whole.

The Board's General Counsel, in his attempt to prove the allegations set forth in the complaint, called one and only one witness, namely, Robert L. Whaley. Whaley's testimony, which therefore constitutes the entire testimony offered in proof of the General Counsel's case, if credited in its entirety, merely discloses the following:

(1) That Whaley was employed by Petitioner as a warehouse foreman; that his employment was terminated on February 18, 1955, for the reason, as expressed in a letter to Whaley, that his employment was "presently unsatisfactory to management" (J. A. 13, 25-27, 253);

(2) That in or about March, 1954, while employed in a supervisory position, Whaley became interested in a labor union and became a member thereof (J. A. 13-14, 27-38);

(3) That in April, 1954, Whaley talked to L. M. Everett, Sr., who was Petitioner's president at the time, concerning his relationship with the union and that, according to Whaley's testimony, "he told me that he didn't know why we did want to go (union), but if we did he would be willing to go along with it"; that Whaley informed L. M. Everett, Sr., that he was in favor of the union (J. A. 14);

(4) That Thomas Everett, Petitioner's president at the date of the hearing, told Whaley, in response to a statement by Whaley that he thought he would be fired for engaging in union activities, that nobody would be fired because they were in a union. This conversation developed during a conference between Thomas Everett and Whaley wherein Evertt admonished Whaley for spreading false rumors that the Petitioner was ruining his health and asked that Whaley stop making such statements (J. A. 36-37);

(5) That Whaley testified in the proceedings before the Board on July 17, 1954, that he *overheard* a conversation between Jack Everett, plant manager, and Garland Talley, another supervisory employee, in which Jack Everett allegedly made a remark that "he would fire everyone that signed a union card if it took him ten years to do it and that he had a good memory"; that approximately three days after overhearing this conversation, he again *overheard* Jack Everett make a remark that he knew three of the six leaders that started the union activities and that if he knew the other three he would "let them go now" (J. A. 15-22). This testimony is wholly uncorroborated.

(6) That on July 21, 1954, subsequent to his talk with Thomas Everett, wherein Thomas Everett told Whaley he wanted the untrue rumors Whaley was spreading to the effect that the Petitioner was ruining his health stopped, Jack Everett addressed a letter to Whaley which read as follows (J. A. 28-29, 76-77; R. 254):

> "It has come to my attention from different sources that you are making statements to employees regarding the NLRB hearing to the effect that you have licked the company, and in a few days some of the people involved will be back to work and all back wages paid.
>
> "These statements are wholly untrue, as it will be weeks before the outcome of this particular hearing is known to anyone.
>
> "We feel that these malicious statements are harmful to the company and employees to the extent that we must insist that they be stopped.
>
> "Any repetition of such actions will force us to request your resignation."

Whaley admitted complaints had been made "about what I had talked about going through the plant" (J. A. 26).

(7) That Whaley, an active union adherent and member (J. A. 13-14, 27-28), testified when asked, "You were fighting management pretty much weren't you," "I don't think so, not too much" (J. A. 38). This statement must on its face be construed as an overt admission that he was at odds and ends with or fighting management officials.

(8) That on September 7, 1954, during the period between the first hearing before the Board in Case No. 16-C.A.-742 in July, 1954, and the second hearing in Janu-

ary, 1955, L. M. Everett, Sr., the Petitioner's president, called Whaley in and attempted to find out whether the statement attributed to Jack Everett by Whaley that he would fire everyone who signed a union card was actually made; that L. M. Everett, Sr., did not believe such statement had been made; that L. M. Everett, Sr., did not ask him to lie about the matter; that on the following day L. M. Everett, Sr., again called Whaley in so that Petitioner's counsel could talk to him; that in the discussion that followed Petitioner's counsel, in Whaley's own words, "kept on wanting to tell him the *truth*" (Emphasis added) about the situation and inquired of him whether he wished to change his statement; that nothing else was said to him on the subject until the day before the hearing in January, 1955, when he was again asked by Petitioner's counsel if he would consider changing his statement; that nothing more was ever said to him about the matter (J. A. 22-25; R. 74-75);

(9) That L. M. Everett, Jr., called to Whaley's attention errors in the reports which Whaley was responsible for keeping; that L. M. Everett, Jr., called his attention to these errors on more than one occasion; and that Whaley, in effect, admitted making such mistakes (J. A. 77-80);

(10) That after the termination of his services, Whaley, through his attorney, filed a workman's compensation suit claiming a "permanent disability" (J. A. 36; 256-263); that, on occasion, in the performance of his duties Whaley was required to handle heavy bales of rubber (J. A. 33; 38).

(11) That Whaley testified at a N. L. R. B. hearing under subpoena on January 28, 1955. No testimony is in the record as to *what* he testified at this hearing (J. A. 15).

As set forth in the trial examiner's intermediate report (R. 162), Petitioner contends Whaley's services were terminated for cause—that he had become an unsatisfactory employee because of his antagonistic attitude toward management; that he made mistakes and errors in the performance of his record keeping responsibilities; that he spread untrue rumors detrimental to management; and that he was apparently physically and mentally unable to handle his job.

Petitioner respectfully contends that the General Counsel, through the uncorroborated testimony of its only witness, Whaley, has failed to prove a prima facie case that Whaley was discharged because he gave testimony adverse to the interests of the Petitioner. Petitioner further urges that a review of the record testimony will reveal that the findings, conclusions and order of the Board are not supported by substantial evidence on the record as a whole.

At the hearing Petitioner, in defense of its conduct and the charges made against it, presented the following evidence:

(1) That Thomas Everett, Petitioner's president at the time of the hearing, found it necessary to talk to Whaley in March or April, 1954, about the untruths, false rumors and statements Whaley was circulating in the plant prior to the election in the representation case; that during this conversation Whaley admitted spreading certain rumors and tales (J. A. 82-85).

(2) That according to the uncontradicted testimony of L. M. Everett, Jr., the Petitioner's operational manager and purchasing agent who was one of Whaley's immediate supervisors, he called Whaley's attention to mistakes many times, that the number of mistakes committed by Whaley during the last two or three months of his employment increased to the extent of being a nuisance, and that these errors were one of the factors considered in discharging Whaley (J. A. 110-111).

(3) That, as indicated herein, on July 21, 1954, Jack Everett, Petitioner's plant manager, having heard about Whaley's conduct and the statements spread among the employees, found it necessary to write Whaley about his untrue statements concerning the N. L. R. B. hearing to the effect that he (Whaley) had licked the company; that in this letter Everett informed Whaley that his malicious statements were harmful to both the company and the employees (J. A. 76-77; 254).

(4) Altha Lucille Cribbs, who has been employed by Petitioner for 8 years and who during such period of time has been acquainted with Whaley, testified that Whaley did not have a reputation for truth and honesty in the plant, but, rather, that he had a reputation for not telling the truth; that Whaley made the statement, after a hearing before the Board, to her and an Opal McElroy that "if the union hadn't helped any way, it had brought us a raise on the next pay check." No such raise was given (J. A. 55-57).

(5) Lila Belle Magee testified that a few days after Whaley's remark to Cribbs about the "raise," Cribbs told her about his statement (J. A. 66-68).

(6) That the decision to terminate Whaley's employment resulted from a conference between L. M. Everett, Sr., L. M. Everett, Jr., and Thomas Everett; that such decision was the "summation" of several factors: (1) mistakes and errors made in the discharge of his responsibilities, (2) his overall attitude, (3) his disturbing and disruptive influence within the plant, (4) the fact that he was antagonistic toward management to the extent he could not carry out his responsibilities as a supervisor, and (5) his physical inability to properly handle his duties (J. A. 86-88).

(7) That L. M. Everett, Jr.'s, testimony corroborated the testimony given by Thomas Everett that the decision to terminate the employment of Whaley resulted from a conference in which they discussed: (1) his physical ineptness and general attitude, (2) the need for harmonious relations among the employees as a group, (3) Whaley's apparent inability to command the respect of his fellow employees, and (4) the fact that he actually irritated the other employees in one way or another such as the false rumors and so forth" (J. A. 111-115; 86-88).

The testimony as to Whaley's physical inability to perform his duties was denied by him, but was corroborated by his petition for workman's compensation wherein he alleged his physical disability to perform any work, the injury having occurred approximately 10 days prior to his discharge. (J. A. 256-263; 32, 38.)

Petitioner respectfully urges that the substantial evidence on the record as a whole does not permit the conclusion that Whaley was discharged because he gave testimony adverse to Petitioner's interest at a Board hearing because:

(1) Whaley was not discharged until six months after such testimony was first given, and then not until the subsequent occurrence of several overt acts which in fact made his services unsatisfactory, i. e., (1) the spreading of false rumors adverse to his employer on two occasions; (2) more frequent errors in the keeping of records of incoming and outgoing materials; (3) his becoming physically and mentally incapacitated to properly handle his supervisory job; and (4) his development of an antagonistic attitude toward management to the extent that he could not carry out his supervisory responsibilities.

The question has come to mind a thousand times whether any magistrate, judge or justice who had heard or read the record in this case would wait so long and bear so much as Petitioner has from some person employed by one of them in a position of trust. The Board and the court below have placed little significance on the fact that Whaley, beyond dispute, spread false rumors to the detriment of his employer. Would the magistrates and judges who have heard and studied this case take so lightly false rumor-spreading by a trusted supervisor employee, should such employee in a position of trust conduct such a campaign against one of them? Petitioner feels that disloyalty of an employee in a position of trust is the most serious act

which could be committed, and warrants and demands discharge without further reason. Petitioner was tolerant in the extreme.

(2) Whaley's testimony constitutes the entire case of General Counsel; yet Whaley is completely discredited by reason of his admission in his workman's compensation suit that he was permanently and totally disabled from performing any manual work or labor whatsoever, because he testified in the case at bar that he was physically able to perform his duties at the time of discharge, and part of his duties consisted of lifting heavy bales of rubber. Petitioner urges that Whaley is bound by the allegations set out in the petition in his workman's compensation suit that he was unable to perform his duties of employment from the time of his injuries which occurred just prior to his discharge.

The crux of this case is the trial examiner's erroneous credibility finding which is premised entirely on his belief —and it is specifically noted that *no* legal authorities are cited in support of such belief—that Whaley's credibility is not impaired by the claims and statements made in the pleading filed in his workman's compensation suit, and that the allegations set forth therein do not constitute admissions against his interest. Rather, the trial examiner strangely concluded on the basis of Whaley's demeanor, that he was "ready, able and willing" to perform his duties. (R. 166-167.) The law is well established that the statements contained in a pleading filed by an attorney duly employed for such purpose constitute admissions which may later be used in subsequent legal causes by persons who

were strangers to the primary suit. Such rule is clearly set out in *41 Am. Juris., p. 435; 14 A. L. R. 36; McCormick & Ray, Law of Evidence, Vol. 2, page 62; 20 Am. Juris., pp. 501 and 539; 5 Am. Juris., 311-312; 14 A. L. R. 56; 90 A. L. R. 1398; White v. Mechanics Securities Corp. 269 U. S. 283;* and the voluminous cases cited therein. See also *7 C. J. S., pp. 920-921; 31 C. J. S., pp. 1071-1077; 71 C. J. S., pp. 147-152;* and the voluminous cases cited therein. Thus, the trial examiner's conclusion, which the Board and the court apparently adopted, that the admissions contained in the workman's compensation suit do not affect Whaley's credibility is clearly erroneous. Therefore, the very basis, i. e., Whaley's credibility, on which the trial examiner predicates his ultimate unfair labor practice findings must be deemed erroneous.

(3) Other than the uncorroborated testimony of Whaley as to the alleged statement of Jack Everett, the record is completely devoid of evidence that there existed any anti-union attitude on the part of management, or that any employee, Whaley included, suffered a single act of discrimination because of union activity. Whaley himself testified that Mr. Everett, Sr., the president of Petitioner, knew of his union sympathies ten months before his discharge, yet he did not even so much as remind Whaley of his duty to be loyal to management's policies.

(4) The trial examiner found that Whaley was discharged because of his known views concerning the union, *and* because he testified in a proceeding under the Act (R. 168). The *first* finding is that he was discharged be-

cause of his known views concerning the union. If this finding of the trial examiner is correct, the Act permits the discharge. If, as the Board has held, the conclusion is that he was discharged only because of his testimony given before the Board at a prior hearing, such conclusion is just as unsupported by substantial evidence as the former conclusion that he was discharged for union sympathies and activities. It is very obvious that the trial examiner, determined to rule in Whaley's favor recited first what he considered the primary reason for his discharge. The primary reason which occurred to him was Whaley's union activities. The conclusion is therefore inescapable that the trial examiner's findings herein are *colored* by the very fact that he believed Whaley was discharged because of his union activities. The Board, knowing that it is permissible under the Act to discharge a supervisor for engaging in union activities, clung to the trial examiner's secondary conclusion, i. e., Whaley was discharged for giving testimony at a Board hearing. Both the trial examiner and the Board ignored the substantial evidence on the record as a whole, which was overwhelmingly to the effect that Whaley was discharged for cause, viz., his services were unsatisfactory to Petitioner at the time of his discharge. Can it be doubted for an instant from a reading of the record in this case that Whaley's services were unsatisfactory to Petitioner? With the burden of proof being as it is on the General Counsel to prove that the discharge was for an illegal cause, is it not to be presumed that the discharge was caused by the fact that *Whaley's services were unsatisfactory*, as they indeed were. It cannot be presumed that when two

causes existed to discharge Whaley, one illegal and one sanctioned by law, that the illegal course was the one chosen by Petitioner.

The court, in *N. L. R. B. v. Houston Chronicle Pub. Co., 211 F. 2d 848, at 854-855 (C. A. 5)*, in passing upon the question of proper inferences drawn by the Board, stated as follows:

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of *genuine substance*. In our opinion, this is not such a case." (Emphasis added.)

The Court's attention is also directed to *Boeing Airplane Company v. N. L. R. B., 140 F. 2d 423, at 433 (C. A. 10)*, wherein the court expressed it thusly:

> "* * *. There are, however, certain fundamental standards which the Board is required to observe in the effectuation of the legislative purpose, one of which is the traditional rule against the presumption of liability or bad faith. Another is the requirement that the evidence relied upon to support the findings of the Board must be substantial—not a mere scintilla, and the inferences drawn must be reasonable inferences generated by the facts—not surmise and speculation." (Citations omitted.)

The courts fully recognize that the burden is "upon the Board to prove its charges by competent and credible evidence and not upon the petitioner to disprove them." *N. L. R. B. v. Reynolds & Manley Lumber Co., Inc., 212 F. 2d 155, 158 (C. A. 5), cert. den., 346 U. S. 877; N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 144-146 (C. A. 5).*

On the question of whether the Board's findings and conclusions are supported by substantial evidence on the record as a whole, the Court is respectfully requested to take cognizance of the fact that the trial examiner's, and likewise the Board's findings are in fact premised upon inference piled upon inference. Thus, the trial examiner and the Board, in reaching the conclusion that the reasons given by Petitioner for Whaley's discharge were mere pretext, inferred that Whaley's rumor-spreading activities, which Whaley did not expressly deny, were in effect over-exaggerated by Petitioner; inferred, although Whaley admitted making errors in the performance of his responsible record-keeping duties, that such mistakes were of little or no significance, notwithstanding the uncontradicted testimony of L. M. Everett, Jr., to the contrary; inferred, notwithstanding the admissions in the aforementioned pleading, that, by demeanor observation, Whaley was "ready, able, and willing to perform his duties." By reason of these preliminary inferences, the trial examiner and the Board further inferred that Whaley was discharged because of his prior adverse testimony. The rule is well established however that inference piled upon inference is not a substitute

for evidence. *Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, at 616-617 (C. A. 7).* While the Board has the power to draw inferences, such inferences must be "reasonable inferences," from the evidential facts developed at the hearing. *Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 74 S. Ct. 323; N. L. R. B. v. Sunset Minerals, Inc., 211 F. 2d 224, at 226 (C. A. 9).*

This Honorable Court, in its classic *Universal Camera Corp. v. N. L. R. B.* case, *340 U. S. 474,* in passing upon the power of the courts to determine whether a Board order is based upon substantial evidence, laid down the following rule:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record * * *.
>
> "* * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot *conscientiously* find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." (Emphasis added.)

Petitioner therefore urges that General Counsel did not meet his burden of proof in the hearing before the Board,

as the record reflects; that the substantial evidence on the record as a whole does not support the conclusion that Whaley was discharged for having testified at the Board hearing in July, 1954, six months prior to his discharge; that the overwhelming record evidence is to the effect that Whaley, at the time of his termination, was not a satisfactory employee, and that under this record it must be persumed that he was terminated for the many serious reasons which made him an unsatisfactory employee.

Petitioner is fully cognizant of this Court's ruling in the *Universal Camera Corp.* case that "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." However, Petitioner believes that, due to the peculiar facts of this case, the "standard" spoken of by this Court in the *Universal Camera Corp.* case has been "misapprehended, or grossly misapplied" and that, therefore, this is the type of "rare instance" in which this Court should intervene.

QUESTION 2—(Restated)

Whether the court erred in refusing to remand these proceedings to the Board under Section 10(e) of the Act for the purpose of taking additional testimony.

As previously set forth herein, Petitioner, following the Board's decision and order did, on July 23, 1956, submit to the Board its petition for reconsideration and alternative motion for remand (R. 210-249), which the Board denied. One of the primary reasons for submitting such petition

and alternative motion was that new evidence had been discovered that Whaley had given perjured, or at least contradictory, testimony concerning his back injuries, either before the Board or in a sworn deposition taken in his workman's compensation suit filed against the Petitioner's insurance carrier. Evidence, in the form of the pleading in such suit, was already in the record containing admissions fully disclosing the seriousness of Whaley's physical injuries, and the Board had considered such evidence and found, notwithsanding the admissions contained therein, that it failed to impair Whaley's credibility as a witness. Petitioner was, therefore, not attempting to have the Board consider evidence of an entirely new and different nature, but, rather, that the Board consider newly discovered evidence of the same nature which would conclusively prove, by his own admission, that Whaley's physical condition impaired him in the performance of his duties and that his prior testimony to the contrary was not to be credited.

The importance of such newly discovered evidence cannot be over-emphasized. This evidence would have a twofold purpose; namely, (1) to further show that Whaley, the *sole witness for the Board*, related facts in his deposition in his workman's compensation case which were conflicting in the extreme with his testimony before the Board, and (2) to prove by Whaley, himself, that he was discharged because he was physically unable to perform the duties of

his employment,[2] as was testified to by two witnesses of Petitioner.

In attempting to get this evidence before the Board, Petitioner was operating without benefit of procedural guides, under either the Act or the Board's own official

[2]In the aforementioned deposition, in response to questions by the attorney for the insurance company, Whaley testified as follows relative to his ability to work after his injury, which was received just prior to his discharge, and relative to what he told the Unemployment Commission regarding his ability to work:

"Q. Did you have to tell them you were ready to go to work?

"A. Yes, sir.

"Q. Did you have to tell them you were willing to go to work?

"A. Yes, sir.

"Q. Did you have to tell them you were able to go to work?

"A. I was for light work; I asked for light work. I couldn't do heavy work." (J. A. 244).

Regarding the question of why Whaley was discharged, he testified (J. A. 248):

"Q. When did they fire you?

"A. Because I was getting crippled and wasn't able to do as much as they wanted me to, to start with.

"Q. When did they fire you?

"A. I don't remember the date exactly.

"Q. Well, was it just before you went over there for these employment benefits?

"A. Yes, sir.

"Q. You worked about a week after you claim you got hurt?

"A. No, a little bit longer than that, two or three weeks—two weeks, I think.

"Q. How did you get hurt?

"A. I was straightening up some skids with a fork truck and there was—has a metal bottom in it and when that gets damp or wet—something, it gets real slick; with all that powder and rubber and stuff and grease, all gets in the bottom of that and it gets real slick. And if you are not careful, you will slip in it and just as I started to step out of it I tripped and my foot caught the foot pedal and it throwed me down head first and I fell out of the fork truck off of the edge of the dock down into a scrap metal bin head first, down into it. I landed on my right shoulder and flopped over against the sides—it has got ribs up and down it, you know, and it caught me right in the center of my back and my shoulder and right across my kidneys there. It feels like, after two or three days after that, it feels like it had jarred them loose or something, jarred my kidneys loose in there or something. I can't lay on it very long at a time, have to change positions."

Rules and Regulations, and pursued what appeared to be the only available procedural course. Section 10(d) of the Act provided that, "Until a transcript of record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." The Board's official *Rules and Regulations*, containing its *Statements of Procedure*, do not, under the part thereof entitled *Procedure Before the Board, Secs. 102.48, 102.49, 102.50 and 102.51*, or under the part entitled *Motions, Sec. 102.24, 102.25, 102.26 and 102.27*, provide for or grant the right to file motions, petitions for reconsideration or similar requests after the Board has handed down a decision and order. Petitioner, in view of the clear provisions of the Act granting the Board the right to modify or set aside its findings and orders until a transcript is filed a court, submitted its petition for reconsideration and alternative motion, thereby placing before the Board evidence that Whaley, its sole witness, had given, under oath, testimony in his workman's compensation suit contrary to his testimony given at the Board hearing.

In its motion to remand, Petitioner also offered to show the Board that on November 7, 1955, a judgment was entered in the 14th Judicial District Court of Dallas County, Texas, which awarded Whaley the amount of $2,602.50, in settlement of his workman's compensation suit. Petitioner also pointed out, for the Board's enlightenment, that the amount of recovery had by Whaley

represented or was equal to, under the Texas workman's compensation law which allowed $25.00 a week for each week of disability, the amount an employee would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. As stated in *N. L. R. B. v. Vail Manufacturing Co., 158 F. 2d 664 (C. A. 7), cert. denied, 349 U. S. 905*, it is the duty of the court to also view events happening subsequent to alleged unlawful conduct which is the gravamen of a Board complaint.

Neither Petitioner nor its legal counsel was a party to Whaley's workman's compensation suit. At the time Whaley's suit was filed, June 2, 1955, several months had elapsed since Petitioner had terminated his employment. Thus, Whaley a former employee was suing Petitioner's insurance carrier, Traders and General Insurance Company (J. A. 256), and the matter was handled by Whaley's counsel and counsel for the defendant insurance carrier. Although it does not appear in the record herein, inasmuch as Petitioner's alternative request for a remand was denied, Whaley's deposition was taken by voluntary agreement between the parties to his workman's compensation suit, and was never filed with the state district clerk's office, which, as the Court knows, is a very common occurrence. Therefore, the deposition was not a matter of public record and Petitioner did not have access to it as such. The existence of such deposition was not discovered until after the hearing, even though the records in the district clerk's office were searched before the hearing.

The court below, under the statutory authority conferred under Section 10(e) of the Act, unquestionably had the authority and, under the facts of this case, the duty to remand these proceedings to the Board for the purpose of adducing this additional evidence. The court below in its *per curiam* opinion merely states that in its opinion the Board did not abuse its discretion in denying Petitioner's request for a remand. Petitioner's argument was not confined to the question of whether there had been an abuse of discretion on the part of the Board; rather, that the court itself exercise the statutory authority and duty imposed on it by Section 10(e) of the Act, and remand these proceedings for the purpose of adducing additional testimony as requested by Petitioner in its answer, brief and argument before the court. The evidence Petitioner seeks to adduce on the remand, i. e., Whaley's sworn deposition testimony, constitutes newly-discovered evidence which is of absolute vital importance because: (1) it shows that Whaley himself testified under oath in the deposition taken during the pendency of the case at bar that he was in fact terminated "because I was getting crippled and wasn't able to do as much as they wanted me to, to start with" (J. A. 248), and also that "I couldn't do heavy work" (T. 244); and (2) the statements therein clearly conflict with his testimony given at the Board hearing that he was physically able to perform his job duties (J. A. 32), which on occasion required the lifting of heavy objects (J. A. 33; 38). This testimony constitutes beyond reasonable doubt an admission by Whaley that he was not in fact physically able to perform his job duties and that he was discharged for that

reason. If he was so incapacitated, a finding that he was discharged for testifying adversely to Petitioner would have no basis in fact. The Court's attention is again respectfully directed to the vital fact that the injuries sustained by Whaley occurred *after* he testified at the Board hearing. Petitioner urges that the deposition testimony was presented to the Board in Petitioner's petition for reconsideration and motion for remand, that the Board actually had evidence of such conflicting testimony before it for its consideration, and that the Board denied said petition and alternative motion for the reason that nothing was presented therein which had not already been considered by the Board, and for the further reason that, as in the Board's opinion it was only related to a matter of compliance, it was premature. This finding is indeed strange and obviously in error because this evidence had not on any occasion at any prior time been before the Board. Therefore, Petitioner submits that the matter of Whaley's deposition testimony, although not adduced at the Board hearing, had been presented and made known to the Board, was considered by the Board, and was properly a part of the official record herein, as evidenced by the fact that the executive secretary of the Board included and certified it as a part of the record. In fact, the official certified record also includes the Board's order denying same and the affidavit of service of such order (T., pp. 12-13; 212, 250). Moreover, this evidence, regardless of whether considered by the Board, can properly be, and was, urged before the court under Section 10 (e) of

the Act as newly-discovered evidence by Petitioner's request made to the court below for a remand for the purpose of adducing such newly-discovered or additional evidence.

Petitioner contends that the court below had the authority, and duty under the facts herein, under Section 10(e) of the Act to remand these proceedings as requested regardless of whether the Board did or did not consider such evidence. Petitioner asserts that the Board's refusal to grant its request for a remand is not res judicata on the question of the court's power to adduce additional material evidence under Section 10(e) of the Act.

Petitioner would also, as a clear example of Whaley's lack of credibility, direct the Court's attention to certain sworn statements contained in his deposition testimony taken in his workman's compensation suit (T. 245). Therein Whaley, in describing an alleged whiplash injury received in an earlier automobile accident, admitted, in answer to a question inquiring if he alleged permanent disability in the personal injury suit instituted by him as a result of such whip-lash injury, that he claimed that "*I wasn't able to do the work I used to do* because it was too painful for me and I could not rest at night." (Emphasis added.) As a result of this lawsuit, Whaley "netted" $1,600.00, which in all probability means that total recovery before attorney's fees was in the amount of approximately $2,400.00. However, by Whaley's own statement, as clearly set forth in the exhibit, he admitted that he *continued to work right along performing regular work*. The pattern

is strikingly similar, because in this earlier case, as in the present case, Whaley was in effect talking from both sides of his mouth concerning his physical injuries and his ability to work.

The obvious intent of Congress in enacting Section 10(e) of the Act was to expressly provide for situations of the type involved herein in order that the record could be made factually complete where there is material newly-discovered evidence, and particularly so where there exists a strong possibility that an attempt is being made to subvert the purposes of the Act for personal gain.

Petitioner earnestly urges that the evidence it wishes to adduce upon the requested remand is evidence of "genuine substance"—as spoken of by the court in the *N. L. R. B. v. Houston Chronicle Pub. Co. case, 211 F. 2d 848 (C. A. 5)*—and evidence vital to a fair and equitable determination herein. As stated by the Court of Appeals for the Eighth Circuit in *Farmers Co-operative Company v. N. L. R. B., 208 F. 2d 296, at 303*, wherein that court was relying upon this Court's language in the *Universal Camera Corp.* case, it is the court's duty "to determine insofar as humanly possible what the truth is." This is the precise purpose that the remand would serve herein. Petitioner respectfully submits, using the language of this Honorable Court in the *Universal Camera Corp.* case *supra*, that a finding cannot "conscientiously" be made "that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including, the body of evidence opposed to the Board's view," where Petitioner

has newly-discovered evidence which it seeks to adduce on a remand which will clearly show: (1) that Whaley, the Board's only witness, was by his own admission terminated because of his physical inability to perform his duties, and (2) that his testimony at the Board hearing is not to be credited.

QUESTION 3—(Restated)

Whether the court erred in finding that Petitioner's conduct in terminating Whaley's employment constitutes an independent violation of Section 8(a)(1) of the Act.

Congress has provided in Section 8(a)(4) of the Act that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." It would, therefore, appear clear under this unambiguous language of the statute that if an employee is in fact discharged because he has given testimony at a Board hearing that his employer has by such conduct directly violated Section 8(a)(4) of the Act, and that any unfair labor practice based on such conduct must necessarily be predicated on this explicit Section of the Act.

The Board in this case specifically found that Whaley was discharged because he gave testimony adverse to Petitioner. However, the Board did not find that such conduct violated Section 8(a)(4) of the Act. Rather, the Board, without any evidence whatsoever of such fact, concluded that Petitioner's rank and file employees were, as a result of such conduct, subjectively restrained and coerced and

that such conduct therefore constituted an independent violation of Section 8(a)(1) of the Act. The Board stated in its decision that it was not necessary to consider whether Petitioner's conduct violated Section 8(a)(4) of the Act since the remedy would be the same (R. 203). Petitioner asserts that this finding is improper because under the facts of this case, where there is no evidence whatsoever disclosing any conduct which would cause rank and file employees to reasonably fear the same unlawful retaliatory action, the violation, if any, must be found under the section of the Act specifically making such conduct a violation. Obviously, the legislative intent of Congress in enacting the different sections specifically setting forth and defining the various unfair labor practices was that an unfair labor practice finding would be based upon the section of the Act specifically making such conduct illegal. Otherwise, and it would appear elementary, there would be no reason whatsoever for creating and spelling out in clear and unambiguous language the various and different types of unfair labor practice violations. In this case, the trial examiner followed the statute, and, accordingly, found that Petitioner's conduct violated Section 8(a)(4) of the Act, and that by virtue of such violation a derivative violation, using the Board's customary language, of Section 8(a)(1) had occurred. But the derivative Section 8(a)(1) violation is predicated entirely on the primary finding that there has been an independent violation of Section 8(a)(4) of the Act. As an example of independent and derivative violations, a finding that an employer has refused to bargain in good faith constitutes an independent violation of Section

8(a)(5) of the Act for the reason that that particular section specifically proscribes such conduct and makes its commission an unfair labor practice. Therefore, once it is determined that there has been a violation of Section 8(a)(5) of the Act, the Board and the courts conclude that by virtue of such independent violation there has also been a derivative violation of Section 8(a)(1) of the Act; i. e., that such unlawful conduct has also restrained, coerced, and interfered with the rights of the employees. However, the refusal to bargain does not in itself constitute an independent violation of Section 8(a)(1) of the Act. Rather, such finding of a derivative violation is predicated wholly on the primary finding that the refusal to bargain constitutes an independent violation of Section 8(a)(5) of the Act.

Here the Board merely found it unnecessary to consider whether the conduct complained of violated Section 8(a)(4) of the Act, stating that the remedy for the Section 8(a)(4) and 8(a)(1) violations are the same. However, a reading of the Board's remedial order and notice, which Petitioner is required to post for its employees, clearly shows that the remedy is not the same as it would be for a Section 8(a)(1) violation. The Board's order expressly provides that the Petitioner:

> "Cease and desist from:
>
> "(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employ-

ment or any term or condition of employment because he has given testimony under the Act;"

The notice which Petitioner is required to post provides:

> "We will not induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act."

Thus, the Board, although stating that the remedy is the same under its finding that Section 8(a)(1) has been violated, has obviously turned around and fashioned or drafted precisely the same type of order required to remedy a Section 8(a)(4) violation. In fact, the language in its remedial order follows closely the statutory language of Section 8(a)(4) (R. 204-207).

In support of its conclusion that Petitioner's conduct is violative of Section 8(a)(1) of the Act, the Board relied primarily on the *N. L. R. B. v. Talladega Cotton Factory, Inc.* case, *213 F. 2d 208, supra*, wherein the court below found that the willful discharge of supervisors because of their refusal to commit unfair labor practices against rank and file employees for an employer contravened Section 8(a)(1) of the Act. The facts of the *Talladega* case and this case are entirely inapposite. In the *Talladega* case the employer's strong anti-union animus was manifested by rampant violations of the Act, to-wit: unlawful interrogation, widespread threats, discriminatory demotion, discriminatory discharges of rank and file employees, and the discharge of supervisory employees for refusing to commit

unfair labor practices against rank and file employees. In the record of this case there is *no evidence* whatsoever of any anti-union animus. In the *Talladega* case the Board concluded that the "net effect" of the discharge of the supervisory employees "was to cause non-supervisory employees reasonably to fear that the [employer] would take similar action against them." However, none of the acts complained of in the *Talladega* case was committed herein.

Thus, in the *Talladega* case the court was concerned with acts that directly contravened Section 8(a) (1) of the Act, and the court was not required to apply what might be termed subjective tests, because the obvious and direct result of the employer's conduct was to "interfere with, restrain, or coerce employees in violation of Section 8(a) (1) of the Act. However, Petitioner submits that under the record evidence herein, where no rank and file employee was told or had any reason to believe that the discharge of a supervisor was caused by the reason of his having testified at a Board hearing, there can be no independent violation of Section 8(a) (1) of the Act. Petitioner contends that under the facts of this case no employee could reasonably attribute the discharge of Whaley to his prior adverse testimony, or fear the same treatment, or foresee or reasonably infer the same consequence. Using the theory of the *Talladega* case, there was no conduct by Petitioner to "cause non-supervisory employees reasonably to fear that Petitioner would take similar action against them."

Petitioner respectfully directs the Court's attention to the recent *Pedersen v. N. R. L. B.* case, *234 F. 2d 417*

(C. A. 2), which is the only other case Petitioner can find wherein a somewhat similar factual situation was involved, and similar then only to the extent that Pederson was a supervisory employee who allegedly was discharged for answering a subpoena and giving testimony under the Act. In the *Pederson* case, the trial examiner, like the trial examiner in this case, found that the employer's conduct constituted a violation of Sections 8(a) (4) and (1) of the Act. The Board, before passing on the trial examiner's intermediate report in the *Pedersen* case, promulgated new and stricter jurisdictional requirements, and dismissed the complaint without giving consideration to the merits of the case because the employer did not meet such new jurisdictional standards. The Second Circuit, however, in considering the case, specifically noted that by Section 8(a) (4) of the Act "Congress has made it an unfair labor practice for an employer 'to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter'." The court concluded that "the protection afforded by Section 8(a) (4) is coextensive with the power to subpoena, and that the Board, while it "may limit the number of its cases by appropriate criteria, it may not, however, consider a matter without also asserting jurisdiction over the Section 8(a) (4) complaints which are incident to it." The court, accordingly, remanded the case to the Board for further consideration. The *Pedersen* case, therefore, serves as precedent for the proposition that if a finding is made that a supervisor was discharged because he testified adversely

to the interests of his employer at a Board hearing, that the unfair labor practice finding must be based on Section 8(a)(4) of the Act. Thus, the decision of the Second Circuit in the *Pedersen* case conflicts with the decision of the Fifth Circuit herein which finds only an independent violation of Section 8(a) (1) of the Act. This conflict which exists between the Second and Fifth Circuits can, of course, only be resolved by this Honorable Court.

QUESTION 4—(Restated)

Whether the court erred in denying Petitioner's request that the Board's order, which orders full and immediate reinstatement to Whaley in his former or a substantially equivalent position, be modified to provide that such reinstatement be contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work.

Unless the Board's order is modified to provide that Whaley's reinstatement be made contingent, as to the actual time of reinstatement, upon his physical ability to perform required job duties when reinstated, Petitioner is compelled to immediately reinstate Whaley in a job which he may not physically be able to perform if he has not fully recovered from his injuries, and thereby possibly cause additional physical harm to be done to him or, as a result of his incapacity, to other employees for which Petitioner would, of course, be financially responsible and liable. Petitioner again respectfully points out that in his workman's compensation suit, Whaley alleged total and permanent or, alternatively, partial and permanent

disability; that settlement based on such injuries was had in the amount of $2,602.50, which represents or is equal to under the Texas workman's compensation law then in effect, which allowed $25.00 a week for each week of disability, the amount he would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. The Board, fully recognizing that Whaley had suffered physical injury prior to his termination, provided in its order that back pay was to be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (T. 204); however, the Board's order failed to provide that reinstatement would, as to the actual time of reinstatement, be contingent upon Whaley's being physically able to perform his job duties at such time. Thus, Petitioner is compelled to reinstate Whaley without any showing by him that he is physically able to perform duties required of him. Such reinstatement without a prior showing of physical qualification constitutes a deprivation of due process under the Constitution.

QUESTION 5—(Restated)

Whether the court, under the record facts, erred in entering the decree ordering Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the N. L. R. B.

The evidence in this record shows conclusively that in the conversations between Whaley and L. M. Everett, Sr.,

and between Whaley and counsel for Petitioner, Whaley was requested to change his testimony so as to *tell the truth*. Whaley himself admits this. When asked on cross examination, "Well, did he tell you in so many words that he wanted you to tell the truth, didn't he?" Whaley replied, "Yes, sir, he wanted the truth." (J. A. 75.) Further:

> "Q. Did Mr. Everett try to get you to tell—Did he tell you to tell a lie or anything? (J. A. 30.)
>
> "A. No, sir, he didn't ask me to tell a lie.
>
> * * * * * *
>
> "Q. He did not believe it, did he?
>
> "A. He didn't believe it was said." (J. A. 31.)

When asked, "What did you tell Mr. Bonney, if anything?" he replied, "Well, he kept on wanting me to tell him the truth about the situation and wanted to know if I wouldn't change my statement and that they would draw up a plan for me to sign that if I didn't think Jack said that in a joking manner, or did I—that I had decided that he didn't mean what he had said" (J. A. 23).

It seems unprecedented that the court could, under *this evidence*, conclude that Petitioner has done any unlawful act in attempting to have the truth told by the witness. Is not the *Truth* the cornerstone upon which justice is rendered? This is not an inconsequential matter. It is of such importance that it shakes the very foundation of our judicial system and thus our democracy.

Petitioner, therefore, respectfully requests that the court's decree be modified to eliminate such cease and desist order.

CONCLUSION

WHEREFORE, your Petitioner prays that a writ of Certiorari issue under the seal of this court, directed to the Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that upon such review the decree of said court be set aside or, alternatively, that the cause be remanded for the taking of additional evidence, or that the court's decree be modified, as requested herein, and for such further relief as to this Court may seem proper.

Dated August 23, 1957.

Respectfully submitted,

BONNEY, WADE & STUBBLEFIELD,

By W. W. Wade

Of Counsel:

HERBERT S. BONNEY

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

Copies of this Petition for Writ of Certiorari have been served upon the Solicitor General of the United States and the General Counsel of the National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10

* * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

* * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board

may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or cer-

ification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

D-9837

Dallas, Texas

DECISION AND ORDER

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts his findings, conclusions and recommendations with the modifications and exceptions noted below.

We agree with the Trial Examiner that the Respondent discharged Whaley because he gave testimony adverse to its interests in an earlier Board proceeding (Case No. 16-CA-742),[1] and not because of his asserted deficiencies as a

[1] We do not adopt the Trial Examiner's finding which indicates that Whaley was also discharged for his Union sympathies. Not only is this ground not urged as a reason for the discharge, but the record does not support such a finding.

supervisor, as the Respondent contends.[2] We find, as did the Trial Examiner, that this conduct interfered with, restrained, and coerced rank and file employees in the exercise of their self-organizational rights within the meaning of Section 8(a)(1) of the Act. In our opinion, the net effect of Whaley's discharge was to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank and file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act

[2] In finding that the Respondent's asserted reasons for Whaley's discharge were a pretext, the Trial Examiner, among other things, gave little weight to the oral testimony given by the Respondent because the best evidence was the written records which were not produced. Contrary to the Respondent's contention, the Trial Examiner did not mislead the Respondent into not producing these records. A reading of the entire colloquy between the Trial Examiner and counsel discloses that the records were not produced voluntarily and that the parties understood that the nonproduction of the records would affect the weight to be given to the oral testimony.

For the purpose of correcting and clarifying certain statements in the Intermediate Report, we note that Luther M. Everett, Jr., the Respondent's vice-president, testified that he called Whaley's attention to his errors in record keeping, but that he never threatened him with discharge for these errors. We also note that Whaley did not expressly deny spreading a rumor that the Respondent was ruining his health. However, when questioned under cross-examination whether he had admitted to Thomas Everett at the time he was reprimanded for circulating this rumor that he had said "some things like that," Whaley testified that he did not say "ruining my health—because I didn't say it that way." In addition, the Trial Examiner inadvertently failed to mention that Whaley denied that he circulated a rumor about the Union getting employees a raise, although the Trial Examiner stated that he believed Whaley and disbelieved employee Cribbs who testified to the rumor.

adverse to their employer. For these reasons, we find that Whaley's discharge violated Section 8(a)(1) of the Act.[3] In view of this determination, and as the remedy, which we discuss below, would be the same, we find it unnecessary to consider whether the discharge also violated Section 8(a)(4) of the Act.

The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist from its unlawful conduct and take affirmative action necessary to effectuate the policies of the Act.

We have found, in agreement with the Trial Examiner, that Whaley's discharge interfered with, restrained and coerced nonsupervisory employees in the exercise of their statutory rights. Therefore, in order to restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act, we shall provide for Whaley's reinstatement with back pay, as prescribed in the Intermediate Report.[4] However, in accordance with the Board's customary policy, back pay will be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties.

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[3] *Cf. N. L. R. B. v. Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 215-217 (C. A. 5), *enforcing* 106 N. L. R. B. 295, 295-297; *N. L. R. B. v. Vail Mfg. Co.*, 158 F. 2d 664, 666-667 (C. A. 7), *enforcing* 61 N. L. R. B. 181, 182-183, *cert. denied* 331 U. S. 835; *Inter-City Advertising Company*, 89 N. L. R. B. 1103, 1106-1108, *enforcement denied on this point on other grounds*, 190 F. 2d 420, 422 (C. A. 4).

[4] *N. L. R. B. v. Talladega Cotton Factory, Inc.*, supra; *Inter-City Advertising Company*, supra.

We shall further enjoin the Respondent from in any other manner infringing upon its nonsupervisory employees' rights guaranteed in Section 7 of the Act. We find that such an order is necessary to satisfy the remedial objectives of the Act because the Respondent's unfair labor practices reveal an attitude of opposition to the purposes of the Act.[5]

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America,

[5] Cf. *N. L. R. B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 536 (C. A. 4).

AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge; in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order herein;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto as an appendix.* Copies of said notice to be furnished by the Regional Director for the

*In the event this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, as to what steps it has taken to comply herewith.

Dated, Washington, D. C. April 30, 1956.

Boyd Leedom, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member
Philip Ray Rodgers, Member
Stephen S. Bean, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding

before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in "The Remedy" section of the Intermediate Report, as modified by the Board's Decision and Order issued in this case.

BETTER MONKEY GRIP COMPANY
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

ORDER

(Number and Title Omitted)

On April 30, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on July 23, 1956, the Respondent filed a petition for reconsideration of the said Decision and Order, and, in the alternative, a motion for remand. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said petition for reconsideration be, and it hereby is, denied on the ground that nothing has been advanced that was not previously considered by the Board; and

IT IS FURTHER ORDERED that the alternative motion for remand be, and it hereby is, denied as it relates to a question of compliance and is therefore premature at this time.

Dated, Washington, D. C., Aug. 10, 1956.

By direction of the Board:

Frank M. Kleiler
Executive Secretary

[1] 115 N. L. R. B. No. 186.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16278

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

BETTER MONKEY GRIP COMPANY,

Respondent.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(May 1, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: The National Labor Relations Board, pursuant to Sec. 10e of the National Labor Relations Act (29 U. S. C. A. 151, et seq.), seeks enforcement of its order.[1]

[1]Substantially to the effect that respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Inducing or attemping to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or from discharging or in any other manner discriminating

The respondent insists: (1) that the Board's factual findings are not supported by substantial evidence; (2) that the Court should remand the proceedings for the purpose of adducing additional testimony; and (3) that the Board's conclusion that respondent's conduct violated Sec. 8(a)(1) of the Act was improper.

For reasons sufficiently appearing in the Board's decision, we are of opinion that substantial evidence on the record as a whole supports its finding that respondent discharged supervisor Robert L. Whaley because he gave testimony adverse to its interests in a prior Board proceeding, and that the Board did not abuse its discretion in denying the respondent's motion that the case be remanded for the purpose of taking additional evidence. We further hold that, under the evidence in the record, the Board was warranted in concluding that the discharge of a supervisor for testifying under the Act interfered with, restrained

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against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the Act;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, etc.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, etc.;

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, etc. necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order;

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto, etc.

The Board's decision and order are reported at 115 N. L. R. B. No. 180.

and coerced nonsupervisory employees in violation of Sec. 8(a)(1) [See *N. L. R. B. v. Talladega Cotton Factory, Inc.*, 5th Cir., 213 F. 2d 209, 215-217.], and that a contrary conclusion is not required by Section 8(a)(4) of the Act. *Compare Pedersen v. N. L. R. B.*, 2nd Cir., 234 F. 2d 417.

The order is therefore

ENFORCED.

ORDER DENYING REHEARING

Extract from the Minutes of May 29th, 1957.

No. 16278

NATIONAL LABOR RELATIONS BOARD,

versus

BETTER MONKEY GRIP COMPANY.

The petition for rehearing in the above entitled and numbered cause is hereby DENIED.

CLERK'S OFFICE:
A TRUE COPY:—

(Seal)

Clerk, U. S. Court of Appeals
Fifth Circuit.

New Orleans, La.,
July 13, 1957.

(Original Filed—June 18, 1957.)

No. 16278

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BETTER MONKEY GRIP COMPANY,

Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Borah, Rives & Brown, Circuit Judges.

By the Court:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its Order dated April 30, 1956. The Court heard argument of respective counsel on April 9, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 1, 1957, the Court being fully advised in the premises, handed down its decision enforcing the said Order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Better Monkey Grip Company, Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing or attempting to induce any witness to change his testimony in any proceeding before the National

Labor Relations Board or from discharging or in any other manner discriminating against any witness with respect to his hire or tenure of employment or any term or condition of employment because he has given testimony under the National Labor Relations Act, as amended (hereinafter called the Act).

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discharge, in the manner set forth in "The Remedy" section of the Intermediate Report of the Trial Examiner of the National Labor Rela-

tions Board dated January 11, 1956, as modified by the Board's Decision and Order dated April 30, 1956.

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Decree.

(c) Post at its plant in Dallas, Texas, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Sixteenth Region, Fort Worth, Texas, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, as to what steps it has taken to comply herewith.

ENTERED: JUN. 18, 1957

CLERK'S OFFICE:—
A TRUE COPY:

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, La., July 15, 1957

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals, enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT induce or attempt to induce any witness to change his testimony in any proceeding before the National Labor Relations Board or discharge or in any other manner discriminate against any witness with respect to his hire or tenure of employment because he has given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Upholsterers' International Union of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL offer Robert L. Whaley full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of his discharge, in the manner set forth in

"The Remedy" section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated January 11, 1956, as modified by the Board's Decision and Order dated April 30, 1956, issued in this case.

BETTER MONKEY GRIP COMPANY
Employer

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact, conclusions and order	3
B. The decision of the court below	7
Argument	7
Conclusion	13

CITATIONS

CASES:

Bethlehem Steel Co. v. *National Labor Relations Board*, 120 F. 2d 641 11

Home Beneficial Life Insurance Company, Inc. v. *National Labor Relations Board*, 172 F. 2d 62 12

National Labor Relations Board v. *Baldwin Locomotive Works*, 128 F. 2d 39 11

National Labor Relations Board v. *Clark Bros. Co.*, 163 F. 2d 373 10

National Labor Relations Board v. *Collins & Aikman Corp.*, 146 F. 2d 454 10-11

National Labor Relations Board v. *Illinois Tool Works*, 153 F. 2d 811 9

National Labor Relations Board v. *Injection Molding Co.*, 211 F. 2d 59 10

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 13

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498 8

National Labor Relations Board v. *Syracuse Color Press, Inc.*, 209 F. 2d 596, certiorari denied, 347 U.S. 966 10

National Labor Relations Board v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 ..... 10, 12

Page

National Labor Relations Board v. *Vail Mfg. Co.*, 158 F. 2d 664, certiorari denied, 331 U.S. 835 9-10
Pedersen v. *National Labor Relations Board*, 234 F. 2d 417 .. 11
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17 10
Southport Petroleum Co. v. *National Labor Relations Board*, 315 U.S. 100 12

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 7 ..... 2, 10
Section 8(a)(1) 2, 3, 5, 7, 8, 9, 10
Section 8(a)(4) 6, 7, 8
Section 10(e) 11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 51-53) is reported at 243 F. 2d 836. The findings of fact, conclusions of law, and order of the Board (R. 38-73, 87-94)[1] are reported at 115 NLRB 1170.

---

[1] References designated "R." refer to the Transcript of Record printed as Volume I pursuant to the rules of the court below; references designated "J.A." refer to the joint appendix to the briefs of the parties in the court below.

JURISDICTION

The decree of the court below was entered on June 18, 1957. A petition for rehearing was denied on May 29, 1957 (Pet. App. 54). The petition for a writ of certiorari was filed on August 27, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner discharged a supervisory employee because of his testimony in a prior Board proceeding and thereby violated Section 8(a)(1).

2. Whether the court below erred in denying petitioner's motion to remand the case to the Board for the purpose of adducing additional evidence.

3. Whether the court below properly refused to modify the Board's order to make reinstatement contingent upon a showing of the employee's present physical fitness.

4. Whether the decree of the court below enjoining petitioner from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board is appropriate and valid.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the Petition (pp. 41-43), is as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organ-

izations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

STATEMENT

A. *The Board's findings of fact, conclusions and order.* The Board found that petitioner violated Section 8(a)(1) of the Act by discharging Robert Whaley, a supervisor, because he gave testimony adverse to its interests in a prior Board proceeding. The subsidiary facts upon which this finding rests may be summarized as follows:

On July 17 and 19, 1954, the Board held a hearing on a prior unfair labor practice complaint against petitioner which alleged, *inter alia,* that petitioner had discriminatorily discharged six employees because of their union activities (R. 39-40; 27-32, J.A. 31-33).[2] Whaley testified under subpena that he had heard petitioner's plant manager make statements to the effect: (1) that he would "fire everyone that signed a union card if it took him ten years to do it, and he had a good memory"; and (2) that he "knew there was six of them leaders that started this union and he knew three of them and if he knew the other three, why,

[2] Case No. 16-CA-742, entitled "Better Monkey Grip Company and Upholsterers' Union of North America."

he would let them go now" (R. 44-45, n. 5, 43, n. 3, 46, n. 6; J.A. 10-13).

Following the issuance of the Trial Examiner's intermediate report in this prior case (August 27, 1954) finding it guilty of unfair labor practices, petitioner on three occasions sought to persuade Whaley to change his testimony (R. 45-46; 13-15). On September 7, petitioner's president asked Whaley if he would alter his testimony to the effect that the plant manager "said what he did in a joking manner or that he didn't mean what he said" (R. 45; J.A. 13-14). Whaley replied that he could not do so because that "would be lying" (R. 45; J.A. 14). The next day petitioner's attorney joined its president in requesting Whaley to repudiate his testimony or sign a statement that the plant manager's remarks had been jocular (R. 45; J.A. 14-15). Despite Whaley's refusal, petitioner's president and attorney solicited his signature on such a statement the following day and Whaley again refused (R. 45; J.A. 15).

Thereafter, on September 18, petitioner filed a motion for remand for the purpose of adducing additional evidence with respect to Whaley's testimony (R. 40). The Board granted petitioner's motion and scheduled the case for rehearing on January 28, 1955 (*ibid.*). On January 27, petitioner's attorney again approached Whaley with respect to his prior testimony, asking him if he still "had [his] mind made up to go through with it" or if he "would consider changing [his] statement" (R. 45; J.A. 15). Whaley refused to cooperate and testified, under subpena, at the rehearing consistently with his original testimony (R. 45-46; J.A. 15). The Trial Examiner issued a supplemental

report, affirming his original findings as to Whaley's testimony, on February 9, 1955 (R. 40).[3]

Shortly thereafter, petitioner's officials conferred concerning Whaley's performance as a foreman, admittedly discussed his testimony at the Board hearing, and decided to discharge him on the next payday (J.A. 63, 57-58). While at work on February 18, 1955, Whaley, who had been in petitioner's employ since 1939, was handed a letter stating: "As your employment in our organization here is presently unsatisfactory to management, it is hereby terminated as of today" (R. 44, 46; J.A. 16, 93-94). He was given no further explanation as to the reasons for his termination, insofar as the record shows.

Upon the foregoing facts and the entire record, the Board found that petitioner discharged Whaley because of his adverse testimony in the earlier Board proceeding and not because of his alleged deficiencies as a supervisor, as petitioner contended (R. 87-88, 48-57). Upon the premise that the statutory rights of employees necessarily include the right to seek their vindication before the Board, the Board concluded that Whaley's discharge interfered with, restrained, and coerced non-supervisory employees, in violation of Section 8(a)(1) of the Act, by causing them to fear the same reprisal if they should testify against petitioner in a Board proceeding and by unduly restricting their right to establish their case through the testi-

[3] On September 17, 1955, the Board, after considering petitioner's exceptions filed in the prior case, remanded it to the Regional Director for a new hearing. On November 4, 1955, the parties entered into a settlement agreement which was approved by the Regional Director (R. 40).

mony of supervisors who have knowledge of the facts (R. 87-89, 46-47, 63-64).[4]

In order to "restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act" (R. 89), the Board ordered petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board, from discharging or otherwise discriminating against any witness for giving testimony under the Act, and from in any other manner infringing upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate Whaley with back pay and to post an appropriate notice (R. 90-94).[5]

---

[4] The Board found it unnecessary to determine whether the discharge was also violative of Section 8(a)(4) of the Act, as the Trial Examiner found (R. 89, 57-63). The Board found no record support for, and hence did not adopt, the Trial Examiner's finding that Whaley's discharge was attributable in part to his union sympathies (R. 87, n. 1).

[5] A week or two before his discharge, Whaley fell and injured his back while at work (R. 53). Although no management official contradicted Whaley's testimony that he was working when discharged and able to perform the duties required of him (R. 53; J.A. 32), petitioner sought to impeach his credibility through the pleadings in a workman's compensation suit filed on Whaley's behalf by an attorney in June 1955, several months after the discharge. The petition in that case, which was unverified, alleged alternatively total or partial disability as a result of the fall (R. 53; J.A. 30, 97-107). Whaley testified that he had not read the petition, was unfamiliar with its contents, and had merely authorized his attorney to file a claim asserting where and how he was injured (R. 53; J.A. 26, 30). The trial examiner, who "gave very close attention to the demeanor" of Whaley as a witness, found that his credibility was unimpaired by the allegations of the petition filed on his behalf (R. 53-54). In accordance with its customary policy, the Board ordered back pay abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (R. 90).

Following the Board's decision and order, petitioner, on July 23, 1956, filed a petition for reconsideration and, in the alternative, a motion for remand for the purpose of adducing evidence as to whether Whaley is now physically able to perform the duties which would be required of him if he were reinstated (R. 96-139). On August 10, 1956, the Board issued an order denying the petition for reconsideration on the ground that it advanced nothing not previously considered by the Board and denying the alternative motion for remand on the ground that it related to a question of compliance and was therefore premature (R. 140).

B. *The decision of the court below.* The court below sustained the findings and order of the Board (Pet. App. 51-53). The court found substantial evidence on the record as a whole to support the Board's finding that petitioner discharged Whaley because he gave testimony adverse to its interests in the prior Board proceeding. The court further held that the Board was warranted in concluding that petitioner's conduct interfered with, restrained and coerced nonsupervisory employees in violation of Section 8(a)(1), and that a contrary conclusion was not required by Section 8(a)(4). In addition, the court concluded that the Board did not abuse its discretion in denying petitioner's motion for a remand to adduce additional evidence, and likewise denied petitioner's similar motion addressed to the court.

ARGUMENT

1. Petitioner's main argument (Pet. 7-21) that the reason for Whaley's discharge was his alleged shortcomings as a supervisor rather than his testimony before the Board raises only an issue of fact which

the court below resolved adversely to petitioner for "reasons sufficiently appearing in the Board's decision" (Pet. App. 2, R. 87-88, n. 1, 2, 48-57). This challenge to the substantiality of the evidence supporting the Board's finding presents no question warranting review by the Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503.

Also inappropriate for further review is petitioner's contention (Pet. 30-36) that the Board's finding that Whaley's discharge constituted interference with, and restraint of, employees in the exercise of their rights under the Act within the meaning of Section 8(a)(1) is lacking in evidentiary support because "no rank and file employee was told or had any reason to believe" that Whaley's dismissal was prompted by his testimony at a Board hearing and that therefore "no employee could reasonably attribute the discharge of Whaley to his prior adverse testimony, or fear the same treatment, or foresee or reasonably infer the same consequences" (*id.* 34). In the absence of such evidence, the argument runs, there is no basis here for a finding of an independent unfair labor practice within the meaning of Section 8(a)(1); the unfair labor practice, if any, must be bottomed upon Section 8(a)(4) which makes it unlawful for an employer "to discriminate against an employee because he has filed charges or given testimony under this Act."[6] In essence, the argument challenges the adequacy of the evidentiary support for the Board's finding that "the net effect of Whaley's discharge was to cause non-

[6] Presumably, petitioner would then urge that since the statutory definition of the term employee excludes supervisors, Section 8(a)(4) would not reach the dismissal of Whaley who was a supervisor.

supervisory employees to fear that the [petitioner] would take the same action against them if they testified against [petitioner] in a Board proceeding to enforce their guaranteed rights under the Act," and that thereby petitioner, in violation of Section 8(a)(1), interfered with, and restrained employees in the exercise of their rights under the Act. The Board's finding in this respect comports with established principles and is adequately supported by the record. The "test of interference, restraint, and coercion under [Section 8(a)(1)] of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. * * * The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7).

The circumstances of this case made it reasonable for the Board to infer that Whaley's discharge was likely to come to the attention of employees and have a coercive effect upon them. Since Whaley testified in a public proceeding involving rank and file employees and several such employees were present as witnesses at the rehearing, at least some rank and file employees knew that he had testified adversely to petitioner. When he was discharged not long after his testimony at the rehearing, with no stated reason for the termination of his 17 years' employment other than that it was "presently unsatisfactory to management" (*supra*, p. 5), the employees would naturally attribute the discharge to the testimony and "have every good reason to fear the same treatment" if they should testify against petitioner in a Board proceeding. *National Labor Relations Board* v. *Vail*

Mfg. Co., 158 F. 2d 664, 666-667 (C.A. 7), certiorari denied, 331 U.S. 835. Since that was "obviously a natural and foreseeable consequence" of petitioner's conduct, it "follows that it was eminently reasonable for the Board to infer" restraint of rank and file employees. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 52, 48-52; See *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 213, n. 3, 217-218 (C.A. 5); *National Labor Relations Board* v. *Injection Molding Co.*, 211 F. 2d 59, 65 (C.A. 8); *National Labor Relations Board* v. *Syracuse Color Press, Inc.*, 209 F. 2d 596, 599 (C.A. 2), certiorari denied, 347 U.S. 966.

Furthermore, even assuming that the employees were unaware of the reason for Whaley's discharge and hence felt no restraint, petitioner's conduct was nevertheless violative of Section 8(a)(1) insofar as it interfered with the employees' utilization of the Act's processes. It is necessary, if employees are to exercise freely the rights guaranteed them in Section 7, that they have unhampered use of Board procedures. The integrity of such procedures would be in serious jeopardy if witnesses who have knowledge of the facts may be intimidated by the risk of discharge into changing or withholding testimony adverse to their employer. Such infringement upon the employees' rights would be no more excused by their ignorance of the constraint than an employer's surreptitious surveillance of union activities is excused by the fact that the employees are unaware of such surveillance. See *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2); *National Labor Relations Board* v. *Collins & Aikman Corp.*,

146 F. 2d 454, 455 (C.A. 4); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C.A. 3); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 646-647 (C.A.D.C.).

There is no basis for petitioner's claim of conflict (Pet. 34-36) between the decision below and *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 417 (C.A. 2). The *Pedersen* case dealt with the question whether the Board could properly dismiss a complaint which alleged that the employer had unlawfully discharged a supervisory employee for testifying, under subpena, in a prior Board proceeding, because of an intervening change in the Board's administrative jurisdictional standards. The court simply held that the protection accorded by the Act to witnesses in Board proceedings is coextensive with the power to subpena and "the Board has no discretion to diminish that protection by declining to exercise jurisdiction because of its own shifting jurisdictional standards." 234 F. 2d at 420.

2. Petitioner's further contention (Pet. 21-30) that the court below erred in refusing to remand the case to the Board for additional evidence overlooks the fact that petitioner failed to "show to the satisfaction of the court that * * * there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" as required by Section 10(e) of the Act. The proffered evidence consisted of a deposition by Whaley in a workman's compensation proceeding which assertedly discredited his testimony in the Board hearing that he was able to perform the duties of his job when he was discharged. The deposition was taken on September 16, 1955, over seven weeks prior to the hearing in this case

(R. 128, J.A. 2). Moreover, petitioner was fully aware of the pendency of that proceeding at the time of the hearing, since it introduced into the record the summons and petition in the workman's compensation suit (*supra*, p. 6, n. 5). In this setting the denial of petitioner's belated application, "addressed to the sound judicial discretion of the court" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104), was not unreasonable.

3. Petitioner's claim (Pet. 36-37) that the court below should have modified the Board's order to make Whaley's reinstatement contingent upon a showing that he is now able to perform the duties which would be required of him upon reinstatement misconceives the nature of the order. The question of Whaley's present physical fitness is prematurely raised at this time, since the court's decree simply fixes petitioner's liability to remedy the unfair labor practice but leaves the details of reinstatement to be worked out in subsequent compliance proceedings before the Board. Petitioner will have full opportunity at that stage to offer further proof before the Board that Whaley's physical condition renders the reinstatement provisions impossible of compliance and to have the Board's determination judicially reviewed. *Home Beneficial Life Insurance Company, Inc.* v. *National Labor Relations Board*, 172 F. 2d 62, 63 (C.A. 4); *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 217-218 (C.A. 5).

4. Finally, also lacking in substance is petitioner's attack (Pet. 37-38) upon the decree of the court below insofar as it enjoins petitioner from inducing or attempting to induce any witness to change his testi-

mony in any proceeding before the Board. The record here indicates that on four occasions petitioner pressed Whaley to recant and change his testimony given in a prior Board hearing to conform to petitioner's version of the incident concerning which Whaley had testified (*supra*, p. 4). In these circumstances, the decree is necessary to protect Board witnesses against undue pressure and restraint and is therefore "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

RUTH V. REEL,
Attorney,

National Labor Relations Board.

September 1957.

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BONNEY, WADE & STUBBLEFIELD,
HERBERT S. BONNEY,
1133 Fidelity Union Life Building,
Dallas, Texas.

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

In the

Supreme Court of the United States

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BETTER MONKEY GRIP COMPANY,
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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Better Monkey Grip Company, respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 28th day of October, 1957, denying

its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, on the following grounds:

I.

Petitioner urges that the Board's order, which the Court below has decreed shall be enforced, compelling the reinstatement of Whaley, a supervisor, with back pay is without basis in law. The Act, Sec. 2(3), in defining the term "employee", specifically states that the term employee "shall not include * * * any individual employed as a supervisor * * *." Sec. 10 (c) of the Act provides only for the "reinstatement of employees." Sec. 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain or coerce "employees" in the exercise of rights guaranteed by the statute. As argued by Petitioner at the Board hearing, in its exceptions and before the Board, no provision of the Act confers upon the Board the power to find that the discharge of a supervisor constitutes an unfair labor practice or to order the reinstatement of a supervisor with back pay. In fact, Congress has seen fit to specifically exempt supervisors from the protection afforded rank and file employees. Yet the Board and the Court below, although clearly denied statutory authority to take such action, have ordered the reinstatement of Whaley, a supervisor, with back pay. Petitioner, in response to the Board's argument, urges that the courts in the *N. L. R. B. v. Talladega Cotton Factory, Inc., 213 F. 2d 209*, and *N. L. R. B. v. Vail Mfg. Co., 158 F. 2d 664, cert. denied, 331 U. S. 835*, cases erron-

eously construed the clear, and unambiguous statutory language used by Congress in specifically exempting supervisors from the Act.

The question of whether supervisors may be thus protected has never been considered by this Court. Petitioner, therefore, respectfully requests that this Court, because of the prime importance of this matter, grant the petition herein in order that this question of whether supervisory employees are protected under the Act may, for the first time, be judicially determined.

II.

Petitioner, in its petition for writ of certiorari (Question 4—p. 26), requested that the Board's order, which orders full and immediate reinstatement to Whaley, a supervisor, in his former or a substantially equivalent position, be modified to provide that such reinstatement be made contingent, as to the actual time of reinstatement, upon Whaley's physical ability to perform such job duties when returned to work. As a basis for such request, Petitioner pointed out that if it were compelled to immediately reinstate Whaley in a job which he could not physically perform, that, as a consequence, he might himself suffer additional physical harm or cause physical injury to be done to other employees, for which Petitioner would, of course, be financially responsible and liable.

Petitioner respectfully pointed out (Pet., pp. 36-37) that in his workman's compensation suit, Whaley alleged total and permanent or, alternatively, partial and perman-

ent disability; that settlement based on such injuries was had in the amount of $2,602.50, which represents or is equal to under the Texas workman's compensation law then in effect, which allowed $25.00 a week for each week of disability, the amount he would have been entitled to receive for approximately 104 weeks, or two years, total physical disablement. The Board, taking cognizance of the fact that Whaley had suffered physical injury prior to his termination, provided in its order that back pay was to be abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (T. 204). However, the Board's order failed to provide that reinstatement would, as to the actual time of reinstatement, be contingent upon Whaley's being physically able to perform his job duties at the time of reinstatement. In response to Petitioner's request, the Solicitor General and the Board's General Counsel argue (Board's brief, p. 12) that Petitioner has misconceived the order. The Board's brief states that Whaley's physical fitness is prematurely raised at this time, and that the order of the court below leaves the details to be worked out in subsequent compliance proceedings before the Board. Petitioner urges that it is, rather, the Solicitor General and the Board's General Counsel who have misconceived the court's decree (Pet., pp. 52, 55) which explicitly enforces, without qualification, the Board's order that Whaley be offered "full and immediate reinstatement to his former or a substantially equivalent position * * *," and further provides that a notice to such effect be posted for its employees. The court's decree does not grant to the Board the power to alter, modify, or change

the order—the Board's order has, in effect and application, been integrated into the court's order and decree. (Pet., pp. 52, 55.)

Moreover, since the date of this Court's denial of the petition for certiorari, the Board has, without any inquiry into the question of Whaley's present physical fitness, requested copy of Petitioner's letter offering reinstatement to Whaley and inquiring how many copies of the notices required by the court's decree and order (Pet., pp. 57, 59) will be needed by Petitioner." Copy of such formal communication is appended hereto and marked "Exhibit A." Thus, Petitioner has not misconceived, as the General Counsel's actions now so clearly demonstrate, the court's order and decree. Petitioner therefore respectfully contends that the enforcement of the court's order and decree would constitute a denial of due process as guaranteed by the Constitution, and requests that this Court modify the reinstatement order to provide that Whaley's reinstatement be made contingent, as to the time of reinstatement, upon his being physically able to perform the duties of such job, which on occasion require the lifting of heavy bales of rubber. Petitioner respectfully points out that if the Board seeks enforcement of the court's order and decree and Petitioner resists, for reason of Whaley's physical unfitness, full and immediate reinstatement and the posting of notices, Petitioner faces civil and criminal contempt action. Modification of the reinstatement and notice posting provisions would remove Petitioner from this position of jeopardy of its constitutional rights.

III.

Petitioner respectfully seeks the Court's reconsideration of Question 2 in the petition for writ of certiorari filed herein, and, in this connection, would point out to the Court that Petitioner has by the ruling of the court below been deprived of the rights guaranteed to Petitioner under Section 10(e) of the National Labor Relations Board Act. Such section provides:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before tthe Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript."

The court below has abused its discretion in refusing to recognize that under Section 10(e) the Board should be ordered to hear additional evidence to allow the consideration of the deposition testimony of Whaley, which is directly in conflict with his testimony before the Board, which deposition testimony proves conclusively by Whaley, *the Board's only witness*; that he was, by his own admission, discharged for physical inability to perform the work (Pet., pp. 21-30). Petitioner urges that the Court grant certiorari on Question 2 and that such question be considered at a full hearing before this honorable Court.

IV.

Petitioner respectfully urges the Court to reconsider Question 5 of the petition for writ of certiorari, filed herein, regarding the error of the court below in ordering the Petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board. In this connection Petitioner earnestly urges that that part of the decree which orders the Petitioner to cease and desist from inducing or attempting to induce a witness to change his testimony, under the facts in this record, deprives the Petitioner of his right to prepare his defense in the event he earnestly feels that a witness has perjured himself at a Board hearing. Indeed, Petitioner felt very certain, when Whaley was interviewed and requested to change his testimony and tell the truth, that Whaley had perjured himself. Whaley was an adverse witness. He was questioned by counsel for Petitioner and by Petitioner as an adverse witness and not as a supervisor. Petitioner contends that Congress in enacting the Act did not intend to make the witnesses of the Board immune from being interviewed by Petitioner in the preparation of its defense. To interpret the Act otherwise would make it unconstitutional under the First Amendment to the United States Constitution which guarantees the right of freedom of speech. See *NLRB v. Wooster Division of Borg-Worner, 236 Fed. 2d 898*, and *NLRB v. Continental Oil, 159 Fed. 2d 362*. In the latter case the Tenth Circuit Court correctly states the rule: "So long as persuasion does not amount to coercion it is within the guarantee, but no one has the

constitutional right to interfere with, restrain or coerce another in the exercise of the same right." The order of the court below to restrain Petitioner from questioning and attempting to have a Board witness tell the truth on the witness stand, constitutes a definite interference with the exercise of Petitioner's right to freedom of speech as guaranteed by the Constitution.

The only facts in this record with reference to the manner of the attempted persuasion of Whaley by Petitioner point beyond question to merely insisting that he tell the truth. (J. A. 30, 31, 75, 23.)

Counsel for Petitioner had the absolute right, and duty, to attempt to establish the truth and present it to the Board. Petitioner strongly urges that the decree should be modified to eliminate the order that Petitioner cease and desist from such action. Petitioner therefore urges that certiorari be granted on Question 5.

Dated November 20, 1957.

Respectfully submitted,

BONNEY, WADE & STUBBLEFIELD,

By .....

Of Counsel:
HERBERT S. BONNEY

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WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

We hereby certify that the above petition for rehearing is presented in good faith and not for delay and that said petition is restricted to the grounds above specified. Dated November 20, 1957.

BONNEY, WADE & STUBBLEFIELD,

By .....
Of Counsel:
HERBERT S. BONNEY

.....

WILLIAM L. KELLER,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorneys for Petitioner.

For Rehearing.

Copies of this Petition for Writ of Certiorari have been served upon the Solicitor General of the United States and the General Counsel of the National Labor Relations Board.

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EXHIBIT A

NATIONAL LABOR RELATIONS BOARD

Sixteenth Region

Federal Center, Suite 2093, 300 West Vickery

Fort Worth 4, Texas

Telephone EDison 5-5341
Extension 284-285

October 30, 1957

Mr. L. M. Everett, President
Better Monkey Grip Company
P. O. Box 6170, 5320 Harry Hines Blvd.
Dallas 2, Texas

Re: Better Monkey Grip Company
Case No. 16-CA-814

Dear Mr. Everett:

I am advised that respondent's Petition for Certiorari was denied on October 28, 1957.

Please refer to the letter of June 20, 1957, from Regional Director Edwin A. Elliott. I shall be awaiting your advice as to how many copies of the Notice for posting you will need. Also, please forward to me a copy of your letter offering reinstatement to Robert L. Whaley. I will then be in touch with you concerning the matter of back pay and any other matters bearing upon compliance.

Your cooperation will be appreciated.

Sincerely,

JOHN F. WHITE,
John F. White
Enforcement Officer